

DOCKET

No. 88-1076-CFX
Status: GRANTED

Title: J. Paul Preseault, et ux., Petitioners
v.
Interstate Commerce Commission, et al.

Docketed:
December 27, 1988

Court: United States Court of Appeals
for the Second Circuit

See also:
89-564

Counsel for petitioner: Monte, Jose Maria, Berger, Michael M.
Counsel for respondent: Dunleavy, John K., Solicitor General,
Kahn, Fritz R.

Entry	Date	Note	Proceedings and Orders
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1	Dec 27 1988	G	Petition for writ of certiorari filed.
2	Dec 27 1988		Appendix of petitioner J. Paul Preseault, et ux. filed.
4	Jan 25 1989	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
3	Jan 26 1989		Brief of respondents City of Burlington, et al. in opposition filed.
6	Jan 26 1989		Order extending time to file response to petition until February 25, 1989.
7	Feb 21 1989	G	Motion of National Association of Reversionary Property Owners for leave to file a brief as amicus curiae filed.
8	Feb 23 1989		Order further extending time to file response to petition until March 23, 1989.
9	Mar 22 1989		DISTRIBUTED. April 14, 1989
10	Mar 22 1989	X	Brief of respondents ICC, et al. in opposition filed.
12	Apr 17 1989		REDISTRIBUTED. April 21, 1989
13	Apr 24 1989		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
14	Apr 24 1989		Motion of National Association of Reversionary Property Owners for leave to file a brief as amicus curiae GRANTED.
15	Apr 24 1989		Petition GRANTED. *****
16	Jun 6 1989		Brief of petitioner filed.
17	Jun 6 1989		Joint appendix filed.
18	Jun 7 1989		Brief amici curiae of Pacific Legal Foundation, et al. filed.
19	Jun 8 1989		Brief amici curiae of American Farm Bureau Federation, et al. filed.
20	Jun 8 1989		Brief amicus curiae of Natl. Association of Realtors filed.
31	Jun 8 1989		Brief amici curiae of Missouri Farm Bureau Federation, et al. filed.
21	Jun 23 1989		Order further extending time to file brief of respondent on the merits until July 29, 1989.
22	Jun 26 1989	G	Motion of respondents Vermont, et al. for divided argument filed.
23	Jul 6 1989		Brief amicus curiae of Natl. Assn. of Reversionary Property Owners filed.
24	Jul 28 1989		Brief of respondents City of Burlington, et al. filed.
25	Jul 28 1989		Brief of Iowa Assn. of County Conservation Bds., et al. filed.
26	Jul 28 1989		Brief of respondent ICC, et al. filed.

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Entry	Date	Note	Proceedings and Orders
28	Jul 28 1989	Brief amici curiae of Rails to Trails, et al. filed.	
29	Jul 28 1989	Brief amici curiae of National Assn. of Counties, et al. filed.	
30	Jul 28 1989	Brief amici curiae of California, et al. filed.	
27	Jul 29 1989	Brief amicus curiae of Montgomery County, MD filed.	
32	Aug 25 1989	CIRCULATED.	
33	Aug 26 1989	X Reply brief of petitioners J. Paul Preseault, et ux. filed.	
35	Aug 28 1989	SET FOR ARGUMENT WEDNESDAY, NOVEMBER 1, 1989. (2ND CASE)	
34	Aug 30 1989	Motion of respondents Vermont, et al. for divided argument GRANTED.	
36	Sep 29 1989	Record filed.	
		* Certified copy of original record and proceedings received.	
37	Nov 1 1989	ARGUED.	

**PETITION
FOR WRIT OF
CERTIORARI**

80-1076①

Supreme Court, U.S.

FILED

DEC 27 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1988

No.

J. PAUL PRESEAULT and
PATRICIA PRESEAULT,
Petitioners

v

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
STATE OF VERMONT, CITY OF BURLINGTON
and VERMONT RAILWAY, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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December 23, 1988

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QUESTIONS PRESENTED FOR REVIEW

1. Does the 1983 Trails Act Amendment, 16 U.S.C. §1247(d) or the Interstate Commerce Commission's Interpretation of the Amendment, Work a Taking of Petitioners' "Reversionary" Property Interest by Indefinitely Postponing the Extinction of the Railway Easement, Which Easement Would Have Lapsed but for the Enactment of 1247(d)?

2. Does 1247(d) or the Commission's Interpretation of the Act, Work a Physical Taking of Petitioners' Property by Permitting the City of Burlington to Possess and Occupy the Former Railway Easement For So Long as it is Used As a Bicycle Path?

3. Does 1247(d) or the Commission's Interpretation of the Act, Work a Regulatory Taking of Petitioners' Property by Denying Petitioners' All Use and Occupation of the Property and by Placing the Property in a Federal Rail Bank for Future Restoration of Rail Service?

4. Does the Trails Act Amendment Work a Taking of Petitioners Property Without Just Compensation or Due Process in Violation of the Fifth Amendment of the United States Constitution?

5. Is the Trails Act Amendment, or the I.C.C.'s Interpretation of the Amendment, a Valid Exercise of the Commerce Clause.

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IN THE
Supreme Court of the United States

October Term, 1988

No.

J. PAUL PRESEALT and
PATRICIA PRESEALT,
Petitioners

v

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
STATE OF VERMONT, CITY OF BURLINGTON
and VERMONT RAILWAY, INC.
Respondents

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit in *Preseault v. I.C.C.*, Docket No. 87-4117 is reported at 853 F.2d 145 (2nd Cir. 1988). App. 1.

The Decision of the Interstate Commerce Commission, *Trustees of the Diocese of Vermont, et al. v. State of Vermont and Vermont Railway, Inc.*, Docket No. AB-265 (Sub-No. 1X), Finance Docket No. 30702, is reported at 2 I.C.C. 2d. _____ (1986). App. 47.

The conflicting Opinion of the United States Court of Appeals for the District of Columbia in *National Wildlife Fed. v. I.C.C.*, Docket No. 86-1317, consolidated with *Beres v. I.C.C.*, Docket No. 86-1389, is reported at 850 F.2d 694 (D.C. Cir. 1988). App. 15.

Another conflicting opinion of the United States District Court, Eastern District of Missouri, Eastern Division, *Glosemeyer v. Missouri-Kansas-Texas RR*, Docket No. 86-2508C (6), was decided on May 10, 1988 and the Appeal is pending in the Eighth Circuit.

JURISDICTION

The Decision of the Second Circuit Court of Appeals (App. 56) was entered on August 4, 1988 and the Petition For Rehearing In Banc was denied on September 28, 1988. App. 57. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS

United States Constitution, Amendment V:

"nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article I, §8:

"The Congress shall have Power to . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

The Trails Act Amendment, 16 U.S.C. §1247(d):

(d) Railroad rights-of-ways. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provision of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad

rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act [16 USCS §1241 et seq.], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act [16 USCS §§1241 et seq.], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

49 C.F.R. 1152 [Notice of Exemption to Discontinue Common Carrier Service Obligation for Out of Service Rail Lines]. See App. 58.

STATEMENT OF THE CASE

Procedural History and Nature of The Case

Petitioners Paul Preseault and Patricia Preseault, own land adjacent to a railway easement on the shore of Lake Champlain in the City of Burlington, Vermont. The right-of-way has not been used since at least 1975, when the Central Vermont Railway, Inc., removed all tracks and equipment. App. 50.

Petitioners claim that under state law, they own that portion of the easement which abuts their property in fee, subject to an easement for railroad purposes only.

In 1981 Petitioners and other abutting landowners brought a state action to quiet title to the former railway easement. The Vermont Supreme Court held that the state courts would not have subject matter jurisdiction over the easement until such time as a certificate of abandonment was issued by the Interstate Commerce Commission ("I.C.C."). *The Trustees of Diocese v. State*, 145 Vt. 510 (1985). During the course of this state court proceeding, petitioners learned that Central Vermont Railway, Inc., had not sought permission from the I.C.C. to abandon the line in question.

As a result of this state court decision, the property owners filed a petition with the I.C.C., (Finance Docket No. 30702) seeking the issuance of a certificate of abandonment, which, if granted, would have allowed the issue of ownership to be settled in state court. The carrier, Vermont Railway, Inc., and the State of Vermont, subsequently filed a notice of exemption (Docket No. AB-265) pursuant to 49 C.F.R. §1152.50 et seq., designed to automatically exempt the carrier from any obligation to provide rail service and at the same time permit "interim use" of the easement as a bicycle path for the City of Burlington, pursuant to a 1983 amendment to the National Trails System Act, 16 U.S.C. §1247(d). App. 48-49. Petitioners moved for Summary Rejection of the carrier's application for exemption, but the I.C.C. denied the motion and granted the exemption on January 6, 1986. Petitioners' motion for a stay of the effectiveness of the exemption pending administrative review, was denied by the I.C.C. on February 4, 1986. App. 43. A Petition for Reconsideration was denied by the I.C.C. on July 17, 1987. App. 47. Petitioners sought judicial review by the Second Circuit pursuant to 28 U.S.C. §§2321, 2342, on the basis that the I.C.C. Decision and the federal statute under which the Decision was

made, worked a taking of petitioners' private property in violation of the Fifth Amendment of the United States Constitution and that the statute is an invalid attempt to regulate commerce pursuant to the Commerce Clause of the United States Constitution.

On August 4, 1988, the Second Circuit affirmed the I.C.C.'s interpretation of 1247(d), and held the Trails Act Amendment *could never* — as a matter of law — work a taking of property. App. 1. A Petition For Rehearing In Banc was denied on September 28, 1988. App. 57. Petitioners seek review of the Decision of the Second Circuit, because it is in conflict with the Decision of the District of Columbia Circuit Court of Appeals in *National Wildlife v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988).

Facts

In 1898, the Rutland Canadian Railway Company was incorporated and the General Assembly of the State of Vermont delegated the power of eminent domain to the corporation in order to acquire a right of way on which to construct and operate a railroad connecting the City of Burlington with the town of Alburg, Vermont. Petitioners' property was acquired by the Rutland Canadian through the delegated power of eminent domain as shown by Commissioners' Award to the William H. H. Barker Estate, et al., dated August 14, 1899 and recorded in Book 46, Pages 205-206 of the Land Records of the City of Burlington, Vermont. The railroad became operational in 1901.¹

¹Petitioners are somewhat hampered by the Commission's determination that there was "no need for cross-examination or other evidentiary proceedings because no material issues of fact are in dispute." App. 49-50. According to the Commission, the only material fact relevant to its decision was the State's concession "that in late 1975 the Vermont Railway removed track structures between milepost 123.3416 and milepost 124.6875 without Commission approval." App. 50. Be that as it may, we will proceed to cite facts which we believe are undisputed, and which appear on the various documents submitted to the I.C.C. for its consideration. As a matter of settled Vermont law, this only created an easement for railroad purposes. (See cases cited *infra*, pp. 10-11, fn. 2.

In *Rutland Railway Corporation Abandonment of Entire Line*, 317 I.C.C. 393 (1962), the I.C.C. authorized the Rutland Railway to abandon all operations in Vermont, subject to the conditions of acquisition of the line and continued service by the State of Vermont its lessee, Vermont Railway, Inc. See *State of Vermont and Vermont Railway, Inc., acquisition and operation in Vermont*, 320 I.C.C. 330 (1963).

By Virtue of Public Act No. 162 (1963) the General Assembly of the State of Vermont authorized the public service board, as agent for the state, to acquire, by purchase or condemnation, Rutland Railway's rights of way "for the purpose of sale or lease thereof for continued operation of a railroad as may be desirable or necessary for such continued operation."

The State of Vermont received a quitclaim deed, dated January 1, 1964, from the Rutland Railway Corporation which conveyed, in relevant part, whatever interest the Railway had in the subject right of way located between milepost 123.3416 and milepost 124.6875. The northern portion of Petitioners' property, including a segment of the subject railroad easement and abutting parcels, is located approximately 3,348.9 feet (.634 miles) south of the milepost 124.6875.

In late 1975, the State of Vermont and its lessee removed track structures between milepost 123.3416 and milepost 124.6875 without I.C.C. approval and ceased all rail operations. App. 50.

The "Rails-to-Trails" Scheme

The National Trails System Act (16 U.S.C. §1241 et seq.) was adopted in 1968 to increase outdoor recreation. Bills were introduced in Congress beginning in 1980, which culminated in the National Trails System Act Amendments of 1983. The general thrust of the bills was to increase the availability of trails at low cost to the government. (See generally Senate Report 98-1; House Report 98-28). Part of the program adopted in 1983 was the so-called "rails-to-trails" scheme.

It had come to Congress' attention that there was a "problem" in utilizing some abandoned railroad rights-of-way for recreational trails because the railroads owned only limited easements in those rights-of-way which terminated when railroad use was abandoned. The "problem" was settled state real property law which generally provided that, on abandonment, the railroad's interest would automatically lapse, restoring unburdened title to the underlying property owners. Thus, on abandonment, railroads which owned only easements would be unable to convert their former rights-of-way into recreational trails even if the railroads so desired.

The solution which Congress devised was 16 U.S.C. §1247(d). Congress was ingenuously open about its intent:

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." (House Report 98-28 at 8-9).

The problem with this Congressional solution is that it:

(a) sought to override and retroactively change state property law;

(b) ignored settled decisions of this Court that property interests are defined by state, not federal, law; and

(c) refused to authorize the expenditure of federal funds for the program except as expressed in appropriations Acts.

The upshot was confusion. The I.C.C. understood that Congress intended for no funds to be expended. It also understood that Congress intended to eliminate the "problem" caused

by the legal doctrine that cessation of all rail use works an automatic abandonment of railroad easement and returns full dominion over the property to the underlying property owners. Thus, when it drafted rules to implement the "rails-to-trails" scheme, the I.C.C. concluded that the scheme would not take property from any private property owners and that, in any event, no compensation could be awarded for any "delay" in the ability of property owners to recover full use of the land underlying former railroad rights-of-way.

ARGUMENT

I. THE CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION IN *PRESEULT v. I.C.C.* AND THE D.C. CIRCUIT'S DECISION IN *NATIONAL WILDLIFE v. I.C.C.* LEAVES UNSETTLED THE QUESTION OF WHETHER THE TRAILS ACT AMENDMENT WORKS A TAKING OF REVERSIONARY PROPERTY INTERESTS

The decision below is in irreconcilable conflict with *National Wildlife v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988). Here, the Second Circuit opined that 16 U.S.C. §1247(d), or the I.C.C.'s interpretation of 1247(d), can never work a taking of private property for a public purpose, while the District of Columbia Circuit holds to the contrary.

Underlying this conflict between the Circuit Courts of Appeals is the I.C.C.'s conclusion that 1247(d) does not work a taking of the "abutting landowners'" property:

We also conclude that abutting landowners have no proprietary interests that require protection or compensation. Since the Amendment provides that interim trail use under §1247(d) shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature. Rail Abandonments — Use of Rights-of-Way as Trails ("Trails Use"), 2 I.C.C. 2d 591, 600 (1986).

In *National Wildlife*, supra at p. 708 (App. 41-42), the D.C. Circuit held that the I.C.C.'s interpretation of 1247(d) was erroneous because the statute may well effect a compensable taking:

None of these sources [*Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 399 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513, 520-21 (1921); *New Haven Inclusion Cases*, 399 U.S. 392, 491-492 (1970); *Lehigh & New England Ry. v. I.C.C.*, 540 F.2d 71 (3d Cir. 1976); *Gibbons v. United States*, 660 F.2d 1227, 1236-38 (7th Cir. 1981)] however, supports the proposition that the owner of a right-of-way may be deprived indefinitely of the use of her property without compensation therefor. On the contrary, in each of the cases cited by the parties, a temporary imposition upon the property rights of a carrier was necessary in order to insure the continuation of existing rail service and in each case the temporary nature of the imposition was essential to put it on the regulation side of the narrow line separating reasonable regulations from compensable takings.

We are unable, therefore, to conclude that existing precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future.

In stark contrast, the Second Circuit, in this case (App. 12), without citing any case authority, expressly disagreed with *National Wildlife* and deliberately created conflict between the Circuits:

Petitioners claim that 1247(d), by permitting the I.C.C. to issue a Certificate of Interim Trail Use to a carrier that has discontinued service and not to issue a Certificate of Abandonment, enables the I.C.C. to 'take' their property by indefinitely postponing the reversion of an interest that would otherwise vest under state law. *Lawson v. State of Washington*, 730 P.2d

1308, 1315-16 (Wash. 1986); See also *National Wildlife Federation*, slip op. at 20-21. We disagree. The I.C.C. has plenary and exclusive authority to determine whether it is appropriate under all circumstances to allow a railway carrier to abandon a route, and if the I.C.C. determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus, petitioners' reversionary interest, if any, is not postponed any more by the operation of 1247(d) than it could otherwise be affected by the I.C.C.'s continuing jurisdiction.

As the D.C. Circuit pointed out in *National Wildlife*, supra at p. 708 (App. 31), the Fifth Amendment issue requires consideration of those holding property interests in railroad rights-of-way:

Existing rights-of-way were created by voluntary conveyance or thorough condemnation proceedings. See *Schnabel v. County of DuPage*, 428 N.E.2d 671, 676 (Ill. App. Ct. 1981).

If the right-of-way is a fee simple determinable, title to the underlying land vests in the railroad and the grantor (or successor) retains only a reversionary interest (known as a 'possibility of reverter'). See, e.g., *Oregon Dept. of Transportation v. Tolke*, 586 P.2d 791, 795-96 (Or. Ct. App. 1978). If the right-of-way is an easement, the owner of the servient tenement retains title to the underlying land and may be entitled to use the right-of-way in any manner that does not interfere with the railroad's use. See, e.g., *Veach v. Aulp*, 599 P.2d 526, 527-28 (Wash. 1974).

Petitioners herein own the "right-of-way" in fee, subject to an easement for railroad purposes only. Although the Second Circuit did not decide this issue, over 130 years of Vermont case precedent conclusively establishes this crucial point.²

² *Quimby v. Vermont Cent. R. Co.*, 23 Vt. 287, 393 (1851) (interpreting the words "seized and possessed" in the condemnation enabling statute as creating an easement for railroad purposes only); *Stacy v. Vermont Cent.*

In spite of this authority, the State of Vermont and City of Burlington, intervenors below, while agreeing that petitioners' property was condemned pursuant to the "general railroad statute (in effect since the 1840's)," nevertheless "have never conceded that the Rutland-Canadian [Railway] took something less than a fee interest." They claim that the Vermont Supreme Court "hedged by describing the effect of a railroad condemnation as the taking of a special kind of easement."

The Second Circuit's response to claims of ownership made by petitioners and intervenors was as follows:

In this case, however, we need not even address the facts regarding petitioners' claim to this specific property, because we hold that even if they had the reversionary interest they claim, the statute does not effect a 'taking.' (App. 12).

R. Co., 27 Vt. 39, 43 (1854) (abandonment of a right-of-way results in automatic reversion to the adjacent landowner); *Hill v. Western Vt. R. Co.*, 32 Vt. 68, 77-78 (1859) ("[i]t is an easement, a right to use the land in a particular mode for a particular purpose . . . the estate would cease and the land revert, the moment it was put to any other use than the one designated in the charter or statute, by or under which the appropriation was made."); *Rutland Railroad Co. v. Chafee*, 71 Vt. 84, 85 (1899) ("the right of the plaintiff [railroad company] to the land in question is an easement; the only purpose for which it had a right to take it, was for a right-of-way"); *American Steel and Iron Co. v. Taft, et al.*, 109 Vt. 496 (1983) (The State of Vermont as owner of the West River Railroad given the right [assigned to American Steel] to remove railroad structures and equipment within a reasonable time after abandonment and reversion to defendants); *Dickerman v. Town of Pittsford*, 116 Vt. 563 (1951) (Railroad easement terminates automatically upon abandonment, citing 155 A.L.R. 392-394, Anno. Condemnation by Railroad [1945]); *Proctor v. Central Vermont Public Services Corp.*, 116 Vt. 431, 433-34 (1951) ("nonuse for railroad purpose . . . conclusive that premises were abandoned for railroad uses not later than the time the tracks were removed."); *Dessereau v. Maurice Memorials, Inc.*, 132 Vt. 350, 351 (1974) (actual physical abandonment of railroad use results in reversion of the easement, or right-of-way, to the adjoining landowners).

Likewise, the Second Circuit did not address the decisive points presented in convincing fashion by the District of Columbia Circuit in *National Wildlife*. At page 705 of *National Wildlife*, the Court states:

The sole issue here in dispute is the I.C.C.'s determination that reversionary owners whose property interests are defeated by the preemptive effect of the Trails Act Rules upon state laws are not entitled to compensation. App. 36.

The Court then pointed out that the I.C.C. determination was erroneous for the following reasons: (1) 1247(d) and the I.C.C.'s interpretation of the Amendment may result in the permanent physical occupation of property (*National Wildlife*, supra, at p. 706, App. 37)³; (2) "[c]ases considering easements [limited to rail purposes] . . . have uniformly found that a change in use from rails to trails constitutes abandonments of the right-of-way (id. p. 706, App. 38); (3) The Trails Act Rules do not . . . require any finding that resumption of rail service along a particular right-of-way is likely or even possible before authorizing conversion to trail use in derogation of the reversionary owner's expectancy . . ." (id. p. 707, App. 39); (4) the I.C.C. has no procedure whereby the property owner could challenge a finding of the likelihood of the resumption of rail service (id. p. 707, App. 39-49); (5) Prior precedent shows any imposition on those with ownership interests in right-of-ways must be of a temporary nature. (id. p. 707-708, App., 40-42).

The power to regulate commerce is subject to Constitutional limitations. As this court put it in *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264, the question is:

³*National Wildlife*, supra at p. 706, citing *Nollan v. California Coastal Comm'n.*, 107 S. Ct. 3141, 3145 (1987): "a permanent physical occupation occurs 'where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises'."

. . . whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution, or *transgressed affirmative limitations on the exercise of that power* contained in the Fifth and Tenth Amendments." (452 U.S. at 268; emphasis added).

In applying that rule, this Court has not hesitated to invalidate governmental actions (though they might have found justification under the commerce power) if they take private property without compensation. For example, in *Kaiser Aetna v. U.S.*, (1979) 444 U.S. 164, the Army Corps of Engineers that it would be a good idea to decree that a private marina be open to the public. The Supreme Court noted a Constitutional barrier to this exercise of governmental power in furtherance of a perceived public good:

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. (444 U.S. at 174)

Because the commerce power *could not* be used to take private property without compensation, the regulation in *Kaiser Aetna* was invalidated. The commerce power can be no more expansive here.⁴

As we pointed out to the Second Circuit, even a temporary delay may well be a taking because unlike *Gibbons*, supra: (1) under 1247(d), the carrier no longer has any public service obligation and is free to dispose of its assets, including the easement; (2) neither the fee (and reversionary) landowners nor the Trail

⁴ Even in a regulated industry, only limited incursions on property rights may be made before running afoul of the Fifth Amendment. (e.g. *Gibbons v. U.S.*, 660 F.2d 1229, 1233 (7th Cir. 1981); *Lehigh & New England Ry. Co. v. I.C.C.*, 540 f.2d 71 (3rd Cir. 1976).

User has a public service obligation to provide rail service; (3) the main purpose of 1247(d), as articulated by Congress and the I.C.C. is not to provide uninterrupted rail service, but rather to remove "the obstacle" of reversionary property interests and convert former railway easements to recreational use, without compensation to the landowners. In any event, the "delay" in this case is not temporary. In *National Wildlife*, supra, at p. 705 (App. 35), the appeals court addressed this issue:

Nor does the Commission offer support for its suggestion that the reversionary interests are not taken merely because they are postponed indefinitely rather than terminated outright. This proposition is similarly problematic; as the Supreme Court recently reminded, "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *First Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987) (quoting *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting)).

Despite the conflict between the Circuit Courts of Appeals, this Court's decisions leave no question that 1247(d) or the I.C.C. interpretation of 1247(d) works a taking of petitioners' property, specifically, and "reversionary interests," generally; through an after-the-facts redefinition of property rights. As this Honorable Court stated in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984):

E.P.A. encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a 'pre-emption' of whatever property rights Monsanto may have had in those trade secrets . . . The agency argues that the proper functioning of the comprehensive FIFRA registration scheme depends upon its uniform application to all data. Thus, it is said, the Supremacy Clause dictates that the scheme not vary depending on the property law of the State in which the submitter is located . . . This argument proves too much. If Congress can 'pre-empt'

state property law in the manner advocated by the E.P.A., then the Taking Clause has lost all vitality. *This Court has stated that a sovereign 'by ipse dixit,' may not transform private property into public property without compensation . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.* (Emphasis added).

In the text of 1247(d), Congress stated, "ipse dixit" that trail use

. . . shall not be treated for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

This crucial phrase is not ambiguous. As the I.C.C. has repeatedly stated, the amendment is designed to pre-empt state property laws in order to defeat the landowners' property interests without compensation:

The legislative history states that the 'key finding' of section 1247(d) is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This language demonstrates that the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of the entire linear rights-of-way to recreational use when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that Trail Use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interestss.

Trails Use, supra, at p. 597³.

In *Glosemeyer*, supra, at pp. 17-20, the district court reasoned that reversionary property owners could file their 'taking' claims with the Claims Court, pursuant to the Tucker Act,

³ Virtually the same conclusion appears in *Washington Dept. of Game v. I.C.C.*, 829 F.2d 877 (9th Cir., 1987) and *National Wildlife*, supra, at p. 16.

28 U.S.C. §1491, because 1247(d) and the Tucker Act are "capable of co-existence." There are two major problems in the *Glosemeyer* analysis.

First, the Claims Court will be confronted by the same statutory language, that trail use ". . . shall not be treated, for purposes of any law, or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." Since this phrase clearly and unambiguously states that no de facto state abandonment shall be deemed to occur, as a matter of law, even though the public service obligation of the carrier is terminated, it is not possible for the Claims Court to construe a "taking" when the "taking" is predicated on abandonment. 1247(d) permits the carrier to sell the easement, remove tracks and structures, exit the railroad industry, relieve the carrier of any and all obligation to resume rail service, and yet, by the clearly expressed intent of Congress, the Claims Court may not find abandonment and consequently, a taking, as a matter of law.

Secondly, Congressional authorization for land acquisition under the Trails Act has been expressly and specifically limited and does not include land "taken" under 1247(d). See 16 U.S.C. §1249 and Title I, §101, 97 Stat. 42 ("Notwithstanding any other provision of this Act [National Trails System Act, 16 U.S.C. §1241 et. seq.] . . . authority to enter into contracts, and to make payments, under this Act shall be effective only to such extent or in such amounts as are provided an Advance in Appropriation Acts."

In light of these two statutory provisions, petitioners must conclude that Congress, in 1247(d), has expressly withdrawn the Tucker Act as a remedy. (See *Ruckelshaus*, 467 U.S. at 1017). Thus, 1247(d) works a taking of petitioners' property without compensation and without due process of law, in violation of the Fifth Amendment.

The conflicting decisions cited above underscore the importance of the unsettled federal "taking" question with respect to

the Trails Act Amendment. Furthermore, petitioners understand that the I.C.C. has taken no action as yet on remand from the D.C. Circuit, and is continuing to grant interim trails use in derogation of the interests of fee and reversionary property owners. In most of these cases, the property owners are asserting their claims to the I.C.C. with the expectation that the Commission will provide some procedure for the presentation of taking claims pursuant to *National Wildlife*, supra at p. 708 (App. 42). Thus, the resolution of the issues presented in the petition are of the utmost urgency to countless property owners, prospective trail users, and to the effective administration of national rail policy.

II. THE FEDERAL "RAIL BANK" CREATED BY THE I.C.C.'s INTERPRETATION OF 1247(d) IS PRETEXTUAL AND THUS THE AMENDMENT IS NOT A VALID EXERCISE OF THE COMMERCE CLAUSE.

The Court below erred from the outset when it determined that its task in reviewing the "rails-to-trails" scheme as an exercise of the Commerce power was the narrow one of determining whether there was "any rational basis" for the action.

While that may be the *general* standard, and while it may apply in other circumstances, the "rational basis" test has *no* application when it is claimed that the governmental action takes private property for public use.

This Court addressed this question on the last day of its 1986-1987 Term in *Nollan v. California Coastal Commn.*, 107 S.C. 3141 (1987), 97 L.Ed.2d 677. As the court there expressed it:

We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and imagination*. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]'

of a legitimate State interest. We are inclined to be *particularly careful* about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.*" (97 L.Ed.2d at 692; some emphasis added).

As discussed above, under longstanding Vermont law, abandonment of the easements by the Railroad automatically extinguished the easements, returning full, unfettered use of the land to the Property Owners. The "rails-to-trails" scheme was designed to change that aspect of state property law. The legislative history is clear:

The key finding of [§1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, *shall not constitute an abandonment* of such rights-of-way for railroad purposes. ([CITE]; emphasis added).

Because of that fundamental change in property law, which requires the Property Owners to relinquish something which was theirs, the *Nollan* standard of review is required.

Being "particularly careful" in examining the basis of the regulation, as *Nollan* requires, mandates that the courts give substantially less deference to the rationalizations put forth by the government than in pre-*Nollan* times. Regulations can no longer be sustained in court merely because there is *some* rational basis for believing that the challenged action *might* be necessary or useful.

This Court's analysis in *Nollan* makes this clear. There, the government sought to rely on the minimal, rational basis standard of review used by the Court below. (See 97 L.Ed.2d at 690). But this Court would have no part of it. Instead, the Court subjected the government's rationales to strict scrutiny, concluding that one justification for the action was ". . . a made-up purpose of the regulation . . ." (97 L.Ed.2d at 690, fn. 6), while

others were ". . . impossible to understand . . ." (96 L.Ed.2d at 690).

The Second Circuit's review is not compatible with the *Nollan* standard, and its analysis of "Rail Banking," in particular, is superficial.

"Rail Banking" is the preservation of ". . . established railroad rights-of-way for future reactivation of rail service . . ." 16 U.S.C. 1247(d); *National Wildlife*, supra at p. 707, App. 39. In *National Wildlife*, petitioner, Victoria Beres asserted that "the rail banking rationale is a fiction because no railroad that has made the decision to go through an elaborate abandonment proceeding could realistically have any intent of" reactivating rail service. *National Wildlife*, at p. 907 (App. 39). The appeals court rejected this argument, relying on the one and only example of *possible* reactivation of rail service that has occurred since the enactment of 1247(d). *id.* The District of Columbia did observe, however, that the I.C.C. rules do not "require any finding that rail service along a particular right-of-way is likely or even possible before authorizing conversion to trail use in derogation of the reversionary owner's expectancy." *id.*

Petitioners have taken a somewhat different approach than Ms. Beres to rail banking, which, by all accounts is the only Commerce Clause justification for the Amendment, and we have attempted to explain why rail service cannot be reactivated by the I.C.C. under 1247(d). It must, however, be conceded that if 1247(d) had already resulted in some significant reactivation of rail service, there would be no point in trying to argue away historical reality. But the fact of the matter is that rail service has not been reactivated on any line that has been converted to trail use under 1247(d). The procedural mechanics of 1247(d) illustrate the fallacy and fiction of Rail Banking.

As a prerequisite to the transfer of the property to a "state, political subdivision or qualified private organization," the carrier must file an abandonment petition or its equivalent and a find-

ing must be made by the I.C.C. that the abandonment is not necessary to carry out rail transportation policy. This finding is automatic and pre-determined in the case of Exempt Abandonments (49 C.F.R. §1152.50(c)) for carriers that have been out of service for more than two years. App. 58.

After the I.C.C. determines the rail line is "not necessary," the prospective Trail User is given the opportunity to purchase or lease the property for public recreational use, provided the Trail User agrees to assume full legal responsibility for the "interim trail use." 16 U.S.C. 1247(d). If the transfer of property is consummated by "donation . . . lease, sale or otherwise in a manner consistent with the National Trails System Act [16 U.S.C. §§1241 et seq.]," the property is used as trail until such time as the trail use is abandoned or rail service is restored. *Id.*

Thus, the Rails To Trails conversion creates a market and a greater property interest for the railroad, which interest would have terminated automatically upon abandonment, but for the enactment of 1247(d). Even more startling, however, is that after property is transferred, the I.C.C. no longer has jurisdiction over the carrier and the carrier cannot be compelled to resume rail service, because, in most cases, it no longer owns the property.⁶

The I.C.C. has conceded that under 1247(d), jurisdiction continues over the property itself, not the rail carrier. *Trails Use*, supra at p. 599, 612. In its Brief submitted to the Second Circuit, the Commission states at page 22:

[T]he I.C.C. retains regulatory jurisdiction over the property . . . In this instance, the Commission retains jurisdiction unless and until it is notified that the trails use arrangement has ceased and it issues authority for a full abandonment."

⁶ The sole exception might be in a situation where the railway leases the property subject to a right to terminate the lease if it decides to resume rail service.

Indeed, after the Commission finds that rail line is not necessary, the carrier discontinues service, cancels tariffs, salvages track and materials, and sells, leases, donates or otherwise transfers the property to the Trail User. *Trails Use*, supra at p. 612. If the property has been sold or donated, there is absolutely no way rail service can be restored, absent a reacquisition of the property by a rail carrier.

This re-acquisition of the property by the railroad is supposedly accomplished at the first level, by the issuance of a Certificate of Interim Trail Use or Abandonment ("CITU"), which explains "the interim trail use is subject to future restoration of rail service." *Trails Use*, supra, at p. 610.⁷ At some future time, a carrier may apparently request resumption of rail service and receive the easement back, without payment of compensation. *Trails Use*, supra, at p. 599.

Thus, restoration of rail service may be accomplished by another taking of property without compensation. The carrier, under 1247(d), now stands in the shoes of the fee owner, with a new type of reversionary interest, created by federal statute, which may be perfected at such time as the carrier requests and receives permission for the I.C.C. to resume rail service. It should also be pointed out that this procedure of abandonment, sale of the easement, interim trail use and "repossession" of the easement by the carrier — can theoretically be repeated in perpetuity by the carrier under 1247(d).

In light of this procedure, may one rationally conclude that a Trails User will pay for an easement if there exists a significant risk the property will be lost upon resumption of rail service? We think not.

Moreover, the Commission's jurisdiction has been enlarged to the extent where it now acts as the repository for the federal

⁷ If an agreement for trail use is not reached within 180 days, the CITU converts automatically into "an effect certificate of abandonment." *Trails Use*, supra, at p. 610.

Rail Bank. On Deposit is property of reversionary owners and the remote possibility of future restoration of rail service, without any conceivable or rational method available to restore such service. In addition, jurisdiction is now asserted over the property itself, whereas the Commission's jurisdiction is limited by federal statute to transportation by a carrier. See 49 U.S.C. §10501, Subchapter I-IV. There has not been any restoration of rail service under 1247(d), nor will there be any significant restoration in the future. In fact, many *de facto* abandonments, without Commission approval, occurred many years ago, and the property has been used by abutting landowners since that time.

In the case of Vermont Railway, it was required by federal law to seek Commission approval before it terminated service and removed the tracks in 1975, but it did not do so until the abutting landowners petitioned for abandonment in 1985. There are absolutely no plans to restore rail service and riding bicycles over one mile of pavement certainly has no impact on an interstate commerce. Furthermore, the I.C.C. was fully aware that future restoration of rail service in this case may not be possible in any event. In its Decision of February 4, 1986, the Commission states.

Specifically, the Trustees claim that they should be permitted a hearing and opportunity to rebut what they term a necessary finding — that resumption of rail service is possible over this line at some point in the future. The Trustees were given an opportunity to oppose the proposed exemption and did so. In fact, the Trustees made the argument that rail service could not be resumed over the line [footnote omitted]. Moreover, such a finding is not statutorily required and was not made in this proceeding. (App. 44)

As the Commission has determined, the main purpose of the Act (1247(d)) is to defeat reversionary interests. "Railbanking," the Commerce Clause justification of 1247(d) is a shallow pretext used by Congress to effect a Taking of property without compensation.

CONCLUSION

Because there is a conflict between the Circuit Courts of Appeals that affects the property interests of countless property owners across the United States, as well as the administration of National Rail Policy, we respectfully request this petition be GRANTED.

Respectfully Submitted,
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APPENDIX

88-1076 (2)

Supreme Court, U.S.

FILED

DEC 27 1988

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1988

No.

J. PAUL PRESEAUT and
PATRICIA PRESEAUT,
Petitioners

v

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
STATE OF VERMONT, CITY OF BURLINGTON
and VERMONT RAILWAY, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT
APPENDIX

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December 23, 1988

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 764—August Term 1987

Argued: February 22, 1988 Decided: August 4, 1988

Docket No. 87-4117

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

—against—

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA,

Respondents.

STATE OF VERMONT, AGENCY OF TRANSPORTATION,
and CITY OF BURLINGTON, VERMONT and VERMONT
RAILWAY, INC.,

Intervenors.

B e f o r e :

FEINBERG, *Chief Judge*, and PRATT, *Circuit Judge*,
and JOSEPH M. MCLAUGHLIN, *District Judge* for the
Eastern District of New York, sitting by designation.

Petition to review order of Interstate Commerce Commission granting application of State of Vermont and Vermont Railway, Inc., for exemption from obligation to provide rail service and to permit "interim use" of rail corridor as bicycle path for City of Burlington under 16 U.S.C. § 1247(d).

Denied.

RICHARD E. DAVIS, Barre, VT (Richard E. Davis Associates, Inc., T. Christopher Green, of Counsel), *for Petitioners*.

LOUIS MACKALL, Washington, DC (Robert S. Burk, General Counsel, Interstate Commerce Commission, Ellen D. Hansen, Associate General Counsel, Roger J. Marzulla, Acting Assistant Attorney General, Jacques Gelin, Mark L. Pollot, Attorneys, Department of Justice, of Counsel), *for Interstate Commerce Commission and the United States of America*.

JOHN K. DUNLEAVY, Montpelier, VT (Jeffrey L. Amestoy, Attorney General, VT, John T. Leddy, of Counsel), *for Intervenors*.

PRATT, *Circuit Judge*:

Concerned about the disintegration of our national rail system due, in part, to abandonment of rail corridors, - congress called for a study on establishing a "rail bank"

consisting of selected abandoned railroad rights-of-way. Railroad Revitalization and Regulatory Reform Act of 1976, § 809, P.L. 94-210, Title VIII, 90 Stat. 144 (codified as amended at 49 U.S.C. § 10906 (1980)). One significant impediment to the preservation of rail corridors has been that much railroad right-of-way is held by easement only and, under the laws of some states, once rail service is discontinued such easements automatically expire and the rights-of-way revert to adjacent property owners.

To address this problem, congress enacted 16 U.S.C. § 1247(d) as part of the 1983 Trails Act Amendments in order (1) to preserve for possible future railroad use rights-of-way that are not currently in service and (2) to allow interim use of the rail corridors as recreational trails. When a rail corridor is "rail banked" for future use and made available for interim use as a trail under this statute state property laws are preempted and any reversionary interest in the corridor does not vest, even though rail service is discontinued.

This case tests whether the statute, by so preempting state property law, works a taking without just compensation in violation of the fifth amendment of the United States Constitution.

I. *Procedural Background.*

Petitioners Paul and Patricia Preseault are Vermont landowners who claim to hold a reversionary interest in a railroad right-of-way adjacent to their land. Claiming that title to the right-of-way reverted to them in 1975, or earlier, when Vermont Railway discontinued rail service over that route, the petitioners, along with other adjacent land owners, sought a declaratory judgment from the Superior Court of Chittenden County that the easement had been

abandoned and was extinguished. On review of the superior court's dismissal, the Vermont Supreme Court held that, because the railway had not been authorized by the Interstate Commerce Commission ("ICC") to abandon or discontinue service on any part of the railroad line, the railway was still under ICC jurisdiction and, thus, the state court lacked jurisdiction to make any determination regarding the issue of abandonment. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (Sup. Ct. 1985).

The property owners next filed a petition with the ICC seeking a certificate of abandonment with respect to the rail line. Vermont responded that it holds title to the railroad right-of-way in fee simple or, in the alternative, that there would be no reversion while the right-of-way was still employed for a public purpose, even if the state's interest is an easement. In 1962 the state of Vermont acquired from the Rutland-Canadian Railway Company whatever interest Rutland had in the right-of-way and then leased the right-of-way to Vermont Railway, Inc., which operated a railroad across the land until about 1970. While the property owners' petition was still pending the State of Vermont and Vermont Railway, Inc., filed a notice seeking a "class exemption" for the abandonment or discontinuance of out-of-service lines under 49 C.F.R. 1152.50 and indicated Vermont's intention to enter into an interim trail use agreement with the City of Burlington pursuant to 16 U.S.C. § 1247(d).

By a Notice of Exemption decided January 2, 1986, the ICC granted an exemption to the State of Vermont and Vermont Railway, Inc., allowing the railway to discontinue service over the North Burlington branch rail line between mile post 124.687 and mile post 122.910. The ICC

also approved the agreement between the State of Vermont and the City of Burlington for interim trail use under 16 U.S.C. § 1247(d), noting that the state did not seek to abandon any properties, but only to discontinue service. At the same time, the ICC dismissed the property owners' petition for a certificate of abandonment. This appeal followed.

Petitioners do not argue on appeal that the ICC incorrectly interpreted § 1274(d),—indeed, they concede that the statute required the result that the ICC reached. Instead petitioners contend that the statute itself is unconstitutional. Therefore, we need not discuss the statutory question except to note that the ICC's interpretation and application of the statute, through its regulations and through its order in this case, are fully consistent with congress's expressed intent.

II. Jurisdiction.

We reject the argument advanced by the ICC that this court lacks jurisdiction over petitioners' facial challenge to the constitutionality of 16 U.S.C. § 1247(d). Under 28 U.S.C. § 2342

The Court of Appeals * * * has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by § 2321 of this title and all final orders of such Commission made reviewable under § 11901(j)(2) of Title 49, United States Code.

This ICC order is reviewable under § 2321 which provides:

Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation or order of the Interstate Commerce Commission shall be brought in the courts of appeals * * *.

No act of congress specifically provides for jurisdiction in the district courts to review ICC actions. Thus, this court clearly has exclusive jurisdiction to review the ICC's orders, rules, and regulations interpreting statutes, see *National Wildlife Federation, et al. v. ICC*, No. 86-1317, slip op. (D.C. Cir. June 10, 1988), 1988 U.S. App. LEXIS 7898; *Washington State Department of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987), and the ICC does not dispute this. Rather, the ICC argues that, because it cannot rule on the facial constitutionality of its own governing statutes, this court, in reviewing an ICC order, cannot consider petitioners' challenge to the constitutionality of 16 U.S.C. § 1247(d), which is presented for the first time on this appeal. According to the ICC, while this court may consider challenges—including challenges on constitutional grounds—to the ICC's own regulations and rules, any challenge to the constitutionality of the statute may be brought only in the district court. As authority for this proposition, the ICC relies primarily on a dictum in a footnote in *State of Texas v. United States and ICC*, 730 F.2d 409, 419 n.42 (5th Cir. 1984), *amended*, 749 F.2d 1144, *reh'g denied*, 756 F.2d 882, *cert. denied*, 472 U.S. 1032, 105 S. Ct. 3513 (1985). Because petitioners' claim for review is exclusively based on challenges to the constitutionality of the statute, rather than on the ICC's interpretation of the statute, the ICC's position, if valid, would effectively prevent review of its order in this proceeding.

A party seeking judicial review of administrative action may, ordinarily, "draw in question the constitutionality" of the statute under which the agency acted. *Fleming v. Nestor*, 363 U.S. 603, 607, 80 S. Ct. 1367, 1370 (1960). An order of the ICC based on the plain wording of a statute—even where the constitutionality of the statute is beyond the power of the ICC to adjudicate—is nonetheless a decision of the ICC for the purposes of judicial review, and the reviewing court may consider a constitutional challenge to the statute as it affects the validity of the order. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S. Ct. 2457, 2466 (1975). Even where judicial review of agency decisions has been prohibited by statute, challenges to the constitutionality of the underlying statute have been permitted. See *Johnson v. Robinson*, 415 U.S. 361, 94 S. Ct. 1160 (1974) (38 U.S.C. § 211(a), which prohibits review of administrator's decisions, did not prohibit action which challenged the constitutionality of veterans' benefits legislation); *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977) ("constitutional questions are obviously not suited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Id.* at 109, 97 S. Ct. at 986).

The ICC suggests that petitioners' facial challenge to the constitutionality of § 1247(d) should be brought in a federal district court under 28 U.S.C. §§ 1331 and 1337. Indeed, district courts do have jurisdiction to hear constitutional challenges to statutes where no administrative action has yet been taken. *Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 540, 78 S. Ct. 446, 450-51 (1958) (where challenging the constitutionality of a statute in an administrative procedure would be futile, "the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted

constitutional right."); see *Glosemeyer, et al. v. Missouri-Kansas-Texas Railroad Co., et al.*, No. 86-2508C(6), slip op. (E.D. Mo. May 10, 1988), 1988 U.S. Dist. LEXIS 4073. But after the ICC has issued an order, as it has done here, exclusive jurisdiction lies in the circuit court to modify or rescind the order. Thus, if we were to disclaim jurisdiction over the constitutional challenge to the statute, petitioners might prevail on their constitutional challenge in a district court but would be unable to obtain relief from the ICC's order. Where, as here, the petitioners' constitutional challenge to the statute is the sole basis for their challenge to the ICC order, it would be nonsensical to require a bifurcated challenge, relegating the constitutional challenge to the statute to a district court that would be unable to formulate any meaningful remedy. See *Railway Labor Executives' Association v. Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), cert. denied, 107 S. Ct. 927 (1987).

III. Petitioners' Constitutional Challenges.

Having determined that we may consider petitioners' constitutional challenges to the statute, even though they are raised here for the first time, we turn to the merits of their arguments.

1. Commerce Clause.

Petitioners' argue that 16 U.S.C. § 1247(d) is not a valid exercise of commerce clause power because it does not serve a rational, legal purpose. Petitioners contend (a) that congress's idea of a federal "rail bank" is an "utter fiction" because the ICC does not retain jurisdiction over the railway carrier and, therefore, cannot require the carrier to resume service over the route in the future; (b) that the true purpose of § 1247(d) is merely to prevent reversion of

the rights-of-way to property owners after abandonment by the railway carrier; and (c) that congress's attempt to establish a rail bank is mere subterfuge for an attempt to take the rights-of-way for another public purpose—recreational trail use—without just compensation.

In determining whether an exercise of congressional power is valid under the commerce clause a court may consider only (1) whether there is any rational basis for a congressional finding that the regulated activity affects interstate commerce; and (2) whether "the means chosen by [congress are] reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S. Ct. 348, 360 (1964) quoted in *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 276, 101 S. Ct. 2352, 2360 (1981). Petitioners do not challenge congress's authority to regulate railroad abandonments or to set conditions on abandonment or discontinuance of service. Congress's authority to regulate the railroads is well recognized, *Nat'l Railroad Passenger Corporation v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 105 S. Ct. 1441 (1985), as is its authority to regulate railroad abandonments, *Hayfield Northern R. Co. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622, 104 S. Ct. 2610 (1984). The challenged section of the Trails Act serves two purposes: (1) preserving rail corridors for future railroad use and (2) permitting public recreational use of trails. Both purposes are legitimate congressional goals under the commerce clause. The remaining question under commerce clause analysis is whether the means adopted by congress in 16 U.S.C. § 1247(d) are reasonably adapted to these two purposes. Section 1247(d) enables railroads that wish to discontinue service to help preserve rights-of-way for future rail use, when they might otherwise seek to aban-

don a line; it protects the railroad from liability in the interim; and it provides for maintenance of the right-of-way by the trail user during the interim. This seems a remarkably efficient and sensible way to achieve both goals. We conclude that it constitutes a valid exercise of congress's authority under the commerce clause.

2. Takings Clause.

Petitioners also claim that 16 U.S.C. § 1247(d) is unconstitutional on its face because it effects a taking without just compensation. According to them, by establishing the "rail bank" and approving interim use of this section of the corridor as a bicycle trail, the ICC has taken away petitioners' reversionary right to the property. Some railroad rights-of-way are owned by the railway carrier in fee simple, and the carrier may transfer the property or use it for a non-railroad purpose without restriction, except that it may not discontinue service over the route without ICC authorization. Other rights-of-way are specifically limited to railroad use and when the use is abandoned, unencumbered title reverts to the original owner. Petitioners claim to hold title to the land in dispute subject to an easement for railroad purposes. The State of Vermont continues to dispute petitioners' claim that they have some reversionary interest in the right-of-way; the state contends that its predecessor in interest, Rutland-Canadian Railway, obtained a fee interest in the land in the original condemnation proceedings in 1899. In view of our disposition below, however, that issue of state law does not yet have to be resolved.

State law generally determines what interest is retained by a property owner whose land is subject to a railroad right-of-way and what circumstances, if any, may trigger a reversion. See *National Wildlife Federation, et al. v. ICC*,

slip op. at 18; *Schnabel v. County of DuPage*, 101 Ill. App.3d 553, 428 N.E.2d 671 (Ill. App. Ct. 1981). However, state property law, where it concerns railroad rights-of-way, operates only subject to the ICC's plenary authority to regulate railroad abandonments. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320, 101 S. Ct. 1124, 1131-32 (1981).

Until the ICC issues a certificate of abandonment, the railway property remains subject to the ICC's jurisdiction, and state law may not cause a reverter of the property. The Vermont Supreme Court recognized this when it held that an action "brought in state court, seeking to dispose of the property under state law, * * * interferes with the [Interstate Commerce Act's] statutory scheme for regulating interstate commerce." *Trustees of the Diocese of Vermont*, 496 A.2d at 154.

The fifth amendment to the United States Constitution does not prohibit all acquisitions of private property, but requires that just compensation be paid whenever property is "taken" for a public purpose. *First English Evangelical Lutheran Church v. Los Angeles Cty.*, 107 S. Ct. 2378, 2385-86 (1987). Since congress's dual purposes of preserving abandoned railway corridors in a "rail bank" and using these corridors, in the meantime, as recreational trails, satisfy the "public purpose" requirement, just compensation would be required if the statute and ICC's action under it constituted a "taking".

In cases raising allegations of an unconstitutional taking of private property, the Supreme Court has consistently held that " 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate evaluation relevant in the unique circumstances." *Keystone Bituminous*

Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1247 (1987). "Petitioners thus face an uphill battle in making a facial attack on the Act as a taking." *Id.* In this case, however, we need not even address the facts regarding petitioners' claim to this specific property, because we hold that even if they had the reversionary interest they claim, the statute does not effect a "taking".

Petitioners claim that § 1247(d), by permitting the ICC to issue a Certificate of Interim Trail Use to a carrier that has discontinued service and not to issue a Certificate of Abandonment, enables the ICC to "take" their property by indefinitely postponing the reversion of an interest that would otherwise vest under state law. *See Lawson v. State of Washington*, 730 P.2d 1308, 1315-16 (Wash. 1986); *see also National Wildlife Federation*, slip op. at 20-21. We disagree. The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus petitioners' reversionary interest, if any, is not postponed any more by the operation of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction.

Preserving railway corridors for future railway use is a function that congress has recently delegated to the ICC, and it is, as discussed earlier, permissible under the commerce clause. For as long as it determines that the land will serve a "railroad purpose", the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle congress's creative

effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.

We therefore hold that § 1247(d) does not effect a taking.

CONCLUSION

Section 1247(d) is a valid exercise of congressional authority under the commerce clause, and does not effect a taking under the fifth amendment. Therefore, the ICC's order is valid, and petitioners' request for review of the ICC's decision is denied.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1317

NATIONAL WILDLIFE FEDERATION, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF AMERICAN RAILROADS, INTERVENOR

No. 86-1389

VICTORIA BERES, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petitions for Review of an Order of the
Interstate Commerce Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued October 6, 1987

Decided June 10, 1988

Charles H. Montange was on the brief for petitioners National Wildlife Federation, et al. *David Burwell* also entered an appearance for petitioner Rails to Trails Conservancy.

Daryl A. Deutsch was on the brief for petitioner Victoria Beres.

Evelyn G. Kitay, Attorney, Interstate Commerce Commission, with whom *Catherine G. O'Sullivan*, *Donald S. Clark*, Attorneys, Department of Justice, *Robert S. Burk*, General Counsel, and *Ellen D. Hanson*, Associate General Counsel, Interstate Commerce Commission were on the joint brief, for respondents. *Laura Heiser*, Attorney, Department of Justice, also entered an appearance for respondent United States of America.

John B. Norton was on the brief for intervenor Association of American Railroads.

Daniel William Wyckoff, Assistant Attorney General for the State of Washington, was on the brief for amici curiae States of Washington, Louisiana and Florida.

Before: EDWARDS, STARR and D.H. GINSBURG, Circuit Judges.

Opinion for the Court by Circuit Judge D.H. GINSBURG.

D.H. GINSBURG, Circuit Judge: These consolidated cases seek review of the Interstate Commerce Commission's final rules implementing § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (Supp. IV 1986) ("Trails Act"), a statute that governs the conversion of abandoned railroad rights-of-way to nature trails. In the rules under review, the Interstate Commerce Commission interpreted § 8(d) to provide only for voluntary transfers of rights-of-way from railroads to

trail operators and determined that such transfers would not result in a "taking" of the property of the holders of reversionary interests in the rights-of-way. The National Wildlife Federation ("NWF"), petitioner in No. 86-1317, challenges the ICC's determination that § 8(d) does not authorize it to compel a railroad to transfer a right-of-way to a nature trail operator.¹ Petitioner in No. 86-1389, Victoria Beres, is a landowner whose property is subject to an existing railroad right-of-way. She contends that the Commission's regulations authorize the taking of her property without just compensation.

We conclude that the Commission was not unreasonable in deciding to read § 8(d) as authorizing only voluntary transfers of rights-of-way, and we therefore deny NWF's petition for review. We disagree, however, with the Commission's conclusion that the application of its rules may never constitute a taking of the reversionary interests of property owners whose land is subject to a railroad right-of-way. We therefore grant Ms. Beres's petition in part and remand the case so that the Commission can reconsider its rules in light of their possible effect upon the interests of reversionary owners.

I. BACKGROUND

Congress enacted the Trails Act in 1968 in order to establish a nationwide system of nature trails. Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16 U.S.C. §§ 1241 *et seq.* (1982 & Supp. IV 1986)). Congress reserved to itself the right to designate scenic and his-

¹ NWF's petition in No. 87-1317 is joined by the Rails-to-Trails Conservancy, the East Bay Regional Park District, the Heritage Trails Fund, the Iowa Trails Council, the National Parks and Conservation Association, the Nebraska Trails Council, the American Hiking Society, the American Horse Council, and the Bay State Trail Riders Association. In the interest of simplicity, these parties will be referred to collectively as "NWF."

toric trails, and delegated to the Secretaries of the Interior and of Agriculture the authority to designate recreational trails, and to develop and administer the entire trail system. See 16 U.S.C. §§ 1243, 1244, 1246. Section 7(a) of the Act, 16 U.S.C. § 1246(e), provides that the land necessary for a designated scenic or historic trail may be acquired by state or local governments, or by the federal authorities, through cooperative agreements with landowners or by purchase. In the event that all voluntary means for acquiring the right-of-way fail, the appropriate Secretary is given limited power to obtain private lands through condemnation proceedings. See 16 U.S.C. § 1246(g).

As originally enacted, the Trails Act made no specific provision for the conversion of abandoned railroad rights-of-way to trails.² Congress's first effort to encourage this type of adaptive re-use appeared in § 809 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976. P.L. 94-210, Title VIII, 90 Stat. 144 (codified as amended at 49 U.S.C. § 10906 (1982)). Section 809 (a) of the 4-R Act required the Secretary of Transportation to prepare a report on alternative uses for abandoned railroad rights-of-way. Section 809(b) authorized the Secretary of the Interior to provide financial, educational, and technical assistance to various government entities for programs involving the conversion of abandoned rights-of-way to recreational and "conservational" uses.³ Section 809(c) authorized the ICC to delay the disposition of rail property for up to 180 days after the effective date of an order permitting abandonment, un-

² Section 9(b) of the Trails Act does require a number of federal agencies, including the ICC, to cooperate with the Secretaries of the Interior and of Agriculture to ensure that properties under their control that are suitable for trail purposes are made available for such use. See 16 U.S.C. § 1248(b).

³ Sections 809(a) and (b) of the 4-R Act are codified as notes to 49 U.S.C. § 10906.

less the property at issue had first been offered on reasonable terms for sale for public purposes (including recreational use). 49 U.S.C. § 10906 (1982).⁴

Congress renewed its effort to promote the conversion of railroad rights-of-way to trail use when it enacted the current § 8(d) as part of the 1983 Trails Act Amendments. See Pub. L. No. 98-11 § 208, 97 Stat. 48 (codified at 16 U.S.C. § 1247(d) (Supp. IV 1986)). Divided into its three component sentences, § 8(d) provides as follows:

1. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage state and local agencies and private interests to establish appropriate trails using the provisions of such programs.
2. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transporta-

⁴ 49 U.S.C. § 10906 applies once the Commission has determined that abandonment of a rail property is appropriate. It provides, in part, that:

If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

In *Chicago and North Western Transp. Co.—Abandonment*, 363 I.C.C. 975 (1981), the Commission determined that this statute did not authorize it to compel the transfer of railroad property for public use.

tion use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be created, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

3. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

Initially, the Commission proposed to adopt an implementing regulation that interpreted § 8(d) to require that an about to be abandoned right-of-way be transferred to a qualified operator that agreed to assume full responsibility for its operation as a trail. See *Rail Abandonments—Use of Rights-of-Way as Trails*, 50 Fed. Reg. 7200 (Feb. 21, 1985). The Commission received more than 100 written comments on the proposed regulation. NWF and several other commentators supported the ICC's proposed rule, while the Department of Transportation, the National Park Service, and others opposed it. Ms. Beres argued that, as applied to her property, the proposed regulation would work an unconstitutional taking without compensation and urged the Commission to adopt a case-by-case approach to right-of-way conversion in order to avoid such takings.

The Commission's final regulation rejected the mandatory interpretation and concluded that § 8(d) contemplates only voluntary arrangements between railroads

and would-be trail operators. See *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986) (hereinafter "Trails Act Rules" or "Rules"). In reaching this result, the Commission emphasized that a railroad right-of-way is private property that is entitled to protection under the fifth amendment and must be acquired for public use through condemnation proceedings. The Commission observed that § 8(d) contains neither an express delegation of condemnation power to the Commission, nor terms implying that such a delegation was intended, nor any procedures governing the conduct of condemnation proceedings. *Id.* at 597. (Nor does the legislative history provide any indication that Congress intended to delegate a condemnation power in § 8(d).) The Commission also noted that the mandatory rule it initially proposed was not necessary to carry out the primary purpose of § 8(d), namely, to prevent railroad rights-of-way operated under easements from reverting to their grantors when they are abandoned by the railroads, an event that would effectively preclude their conversion to recreational use. *Id.*

In keeping with its interpretation of the Trails Act, the Commission adopted specific procedures designed to encourage the negotiation of voluntary trail use agreements. While the details of these procedures vary depending upon the type of abandonment, the Rules generally require notice to potential trail operators and, if the railroad indicates a willingness to consider such use, time to negotiate an agreement. If such an agreement is concluded with a qualified trail operator, the railroad will be allowed to discontinue current service while retaining the right to resume rail operations on the line in the future. In the interim, the right-of-way may be used as a trail as long as the trail operator continues to assume responsibility for the property.⁵

⁵ In a regular (i.e., regulated) abandonment, for example, the Trails Act Rules require that the abandonment notices

The Commission's decision acknowledged that the operation of its Rules might serve to defeat the reversionary interests of adjacent landowners; indeed, it interpreted this as the "main purpose" of § 8(d) of the Act. *See id.* Nonetheless, the Commission rejected Ms. Beres's claim that her reversionary interest was "property" that would be "taken" through such ICC-sponsored interim trail use. The Commission reasoned that "[s]ince the amendment provides that interim trail use under section [8(d)] shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature." *Id.* at 600.

NWF and Ms. Beres then filed separate petitions for review, which were consolidated here. We have jurisdiction over the petitions by virtue of 28 U.S.C. §§ 2321(a), 2342(5) and 2343 (1982).

filed by the carrier notify potential trail operators to come forward with their proposals. *See* 49 C.F.R. §§ 1105.11, 1152.21 (1987). Any interested trail operator must then file a comment, including a statement of willingness to assume financial responsibility. *See id.* at § 1152.29(a). If the Commission determines that abandonment is warranted, it will direct the railroad to inform the Commission whether it is willing to consider interim trail use. If the railroad declines to consider trail use, it will be issued a full abandonment certificate. If the railroad agrees to negotiate a trail use agreement, it will be issued a "Certificate of Interim Trail Use or Abandonment" ("CITU"), which will allow it to discontinue service, cancel tariffs, and salvage its track after 30 days and will provide 180 days for the carrier and the potential trail operator to negotiate. *Id.* at § 1152.29(c). The CITU will also note that interim trail use is subject to restoration of rail service and will assign financial responsibility for the right-of-way to the trail operator. If negotiation fails, the CITU automatically converts to a full certificate of abandonment. If it succeeds, the CITU remains in effect until the railroad resumes service or the trail operator files a petition with the Commission to terminate trail use. *Id.*; 2 I.C.C. 2d at 602-06, 609-10.

II. DOES § 8(d) REQUIRE MANDATORY TRANSFER OF RIGHTS-OF-WAY?

We consider first petitioner NWF's claim that § 8(d) requires the Commission to transfer rights-of-way to qualified trail operators even when the railroad opposes such use. In reviewing the agency's interpretation of this statute, we must determine whether "Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). If Congress's intent is clear, then any inconsistent regulation must be set aside. If the statute is silent or ambiguous, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.⁶

We begin our analysis with the language of the third sentence of § 8(d), set out above. NWF contends that the use of the word "shall" in that sentence demonstrates that Congress intended to make the transfer of a right-of-way to a qualified operator mandatory. The word "shall" in that section presumably requires that the

⁶ Commentators have suggested that the *Chevron* analysis raises special concerns when the agency's interpretation of a statute serves to increase its own authority or jurisdiction; in such cases, judicial deference must not become a medium for judicial acquiescence in the agency's transgression of the limits Congress has set upon it. *See, e.g.,* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467-68 (1987); Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 Admin. L.J. — (forthcoming 1988); *Kokechik Fisherman's Assoc. v. Secretary of Commerce*, No. 87-5239, slip op. at 11 (Starr, J., dissenting) (D.C. Cir. Feb. 16, 1988). Such concerns need not detain us here; "[s]ince the Commission disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction." *Schwabacher v. United States*, 334 U.S. 182, 204 (1948) (Frankfurter, J., dissenting).

Commission act according to its terms. More specifically, the sentence requires that, under certain specified conditions, the Commission "shall not permit abandonment or discontinuance inconsistent or disruptive of" interim trail use. One undisputed condition is that a state or local government or a qualified private trail operator agree to "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way." (Emphasis added).

NWF argues that once these specified responsibilities are assumed, the Commission must provide for interim trail use regardless of the railroad's wishes. As the Commission notes, however, the use of the phrase "such transfer or use," when read in light of the previous sentence, suggests that the third sentence becomes operative only when the trail proponent has already obtained the right to interim use of the right-of-way "pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with [the Trails Act]." The Commission argues further that, as each of these terms implies a voluntary conveyance, the third sentence of § 8(d) means nothing more than that the ICC must give a certificate for interim trail use when a voluntary agreement for such use has been reached between a railroad and a qualified trail operator.

We agree with NWF that two of these terms, namely "transfer" and the catch-all "otherwise in a manner consistent with [the Trails Act]" might well be read to comprehend a mandatory conveyance; if forced conveyances were elsewhere authorized, these terms would be broad enough to include such transfers within their scope. There is no other source of authority to require transfers of rights-of-way, however, and nothing in the Act requires the Commission to interpret those terms as im-

plicit grants of such authority.⁷ Thus, while the Act clearly requires the Commission to allow for trail use in cases of voluntary agreement, it is far from unambiguous in commanding the Commission to force such a use upon an unwilling railroad.

The conspicuous absence in § 8(d) of any explicit condemnation power further supports the Commission's interpretation of the statute. There can be little doubt that the Commission was correct in concluding that the mandatory reading advocated by NWF would require the Commission to exercise such power, at least in cases where the railroad owned the right-of-way in fee.⁸ The language of § 8(d), however, not only does not authorize the Commission to "condemn" or to "take" railroad property, it does not specify any procedures to be used in appropriating such property and provides no guarantee of just compensation. In this respect, § 8(d) is in

⁷ The use of the term "or otherwise in a manner consistent with [the Trails Act]" is especially puzzling. NWF notes that the Trails Act authorizes condemnation in certain circumstances and argues that mandatory transfer of railroad rights-of-way is therefore "consistent with" the Trails Act. As the Commission points out, however, the Trails Act allows for condemnation by the Secretaries of the Interior and of Agriculture only when Congress has specifically designated a particular area for a scenic or historic trail and all other means of acquiring the necessary land have failed. See 16 U.S.C. § 1246(g). A transfer of property rights mandated by the ICC whenever any qualified trail operator agrees to assume financial and managerial responsibility would not be "consistent with" this narrowly circumscribed condemnation power of the Secretaries.

⁸ NWF disagrees. It argues that railroad property is subject to pervasive federal regulation in the interests of national transportation policy and suggests that the forced transfer of rights-of-way to trail users is less intrusive than other restrictions that have withstood challenge under the takings clause. This argument is addressed in greater detail, *infra* at 26-28, in connection with Ms. Beres's takings claim.

marked contrast to § 7(g) of the same Act, 16 U.S.C. § 1246(g), which expressly authorizes condemnation proceedings. See *supra* at 4, 11 n.7. In view of this contrast between § 8(d) and another section of the same statute, the Commission's reluctance to read the third sentence of § 8(d) to require mandatory transfers of railroad property is entirely reasonable.*

Our conclusion is not altered by anything in the legislative history of the Trails Act amendments. A 1983 House report, the relevant part of which is set out in the margin,¹⁰ is the only substantive history of § 8(d).

* The Commission also noted in its decision the contrast in language between § 8(d) and 49 U.S.C. § 10905 (1982), a statute that expressly grants the Commission the authority to force an abandoning rail carrier either to sell the line for continued rail service or to continue operating it under a subsidy. See 2 I.C.C. 2d at 598.

¹⁰ See H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983):

Section 208 amends section 8 of the Act to encourage the development of additional trails in conjunction with the provisions of the [4-R Act]. This reflects the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes. This appears to be true despite the fact that these efforts have also been to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would

NWF points to the last sentence of the second paragraph, which, viewed in isolation, would provide some support for its position, at least if one were prepared to believe that Congress would blithely fail to mention that it intended the trails program to operate without regard to the objections and interests of the abandoning railroads. In any event, the implication NWF would have us draw from this sentence does not coexist well with the "key finding" at the outset of the same paragraph, viz. that "interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." This passage lends credence to the Commission's argument that § 8(d), by preventing a reversion of the right-of-way upon its abandonment for rail use, was intended merely to make it possible for a willing railroad to make a voluntary interim transfer of the right-of-way for use as a trail. At bottom, however, neither of these snippets of legislative history can conclusively resolve the issue of whether § 8(d) authorizes the ICC to mandate the transfer of a

ensure that potential interim trail use will be considered prior to abandonment. If interim use of an established right-of-way consistent with the National Trails System Act is feasible, and a State, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way—that is, to save and hold the railroad harmless from all of these duties and responsibilities—then the route will not be ordered abandoned.

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. This provision will assist recreation users by providing opportunities for trail use on an interim basis where such situation exists.

right-of-way when a railroad declines to enter into a transfer agreement. After this brief excursion through the almost equally brief legislative history of § 8(d), therefore, we remain where the language of the statute left us under *Chevron*, which is to say, obliged to defer to the ICC's interpretation of the law it administers if that interpretation is not unreasonable.

NWF suggests two extrinsic reasons for setting aside the Commission's reading of § 8(d) as unreasonable. First, NWF argues that, so interpreted, § 8(d) is "purely repetitive of pre-existing law," namely, 49 U.S.C. § 10906. See *supra* n.4; NWF Brief at 26. The Commission has demonstrated that this criticism is unfounded:

Section 10906 has no rail banking provision that would preempt state laws that could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service. Thus, if part or all of a particular right-of-way is held under such an easement or reversionary interest, the trail developer would need to invoke Section [8(d)] to prevent reversion of easement property and maintain the integrity of the transportation corridor. . . . On the other hand, as the Commission explained [in the Rules], Section 10906 may be more desirable to the trail developer than Section [8(d)] if the railroad owns the right-of-way, because it could purchase the property outright and avoid the risk of losing the right-of-way to restored rail service.

ICC Brief at 28-29.

Second, NWF contends that, as interpreted by the Commission, the third sentence of § 8(d) is "not only superfluous but irrational" because there would be no need to allocate responsibilities between the railroad and the trail operator by law, if all trail use agreements are to be voluntary. NWF Brief at 26-27. The Commission concluded that the management, tax, and liability provisions in the third sentence of § 8(d) were intended as "incen-

tives for railroads to consider interim trail use proposals." 2 I.C.C. 2d at 598. We do not agree that this reading of the statute "makes absolutely no sense." NWF Reply Brief at 9. In order to encourage interim conversions of rails to trails, Congress had to meet not only the problem of reversions upon abandonment but also the problem that a railroad may have little to gain from facilitating interim use of its right-of-way as a trail. Its incentive to do so is a function of the probability that it will want to resume rail service over the right-of-way at some later date, a possibility that will be preserved if trail use can prevent abandonment. Congress might reasonably conclude that in marginal cases a railroad will be more willing to deal with a would-be trail operator if it is assured in advance that the negotiating costs of reaching an agreement will be low because key terms have been specified by law and agreed to in advance by the other party.

In sum, the language and legislative history of the Trails Act, as amended, plainly enough demonstrate that Congress intended to promote the transfer of railroad rights-of-way to trail operators by removing the impediment posed by existing reversionary interests. On this all hands agree. Regrettably, Congress did not speak with comparable clarity to the question whether such transfers are to be mandated when a railroad is unwilling to enter into a voluntary agreement. Faced with this ambiguity in the statute, which it forthrightly acknowledged in its Notice of Proposed Rulemaking, the Commission determined, in light of the substantial condemnation problem presented by a mandatory reading of the statute, that it was empowered by the Act to approve only voluntary agreements. We can hardly say that this choice was unreasonable.¹¹

¹¹ In *Washington State Dep't of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987), which was decided shortly after this case was argued, the Court of Appeals resolved an apparently identical challenge to the Rules, by similar reasoning,

III. DO THE TRAILS ACT RULES RESULT IN A "TAKING" OF THE REVERSIONARY INTERESTS?

The Beres petition raises a constitutional challenge to the Trails Act Rules. Beres is the owner of waterfront property located in the State of Washington. Along the waterfront, between her home and the water, runs a railroad right-of-way 200 feet wide. According to Beres, this right-of-way is an easement for railroad purposes only and, under Washington law, it will revert to her in the event that railroad operations cease. She argues that the Trails Act Rules, by permitting a trail operator to take possession of the right-of-way upon termination of rail service, authorize a "taking" of her property without just compensation.¹² See U.S. Const. amend. V

with the same result. See also *Connecticut Trust for Historic Preservation v. ICC*, No. 87-4123, slip op. at 9 (2d Cir. March 9, 1988) (holding that § 8(d) does not clearly confer the power to order trail use).

¹² Beres also advances two separate arguments that warrant only brief mention. First, she asserts that the Trails Act Rules violate the contracts clause, U.S. Const. art. I, § 10. That prohibition applies only to state laws. Any claim that federal legislation unlawfully impairs existing contracts falls under the due process clause of the fifth amendment. To prevail on a due process claim, petitioner must overcome a presumption of constitutionality and demonstrate that "the legislature has acted in an arbitrary and irrational way." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R.R.*, 470 U.S. 451, 472 (1985) (internal quotations omitted). This she has not even attempted to do.

Second, Beres claims that the Trails Act Rules are invalid because they appropriate property for private purposes. There can be no doubt that the purposes advanced by the Rules, namely, the establishment of interim nature trails and the long run preservation of existing railroad rights-of-way, are "public"; assuming *arguendo* that they constitute a taking, the participation of private organizations does not alter their public purpose, and "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

("[N]or shall private property be taken for public use, without just compensation.")

The Beres challenge to the Trails Act Rules requires a brief examination of the property rights of those who own reversionary interests in railroad rights-of-way. Existing rights-of-way were created by voluntary conveyance or through condemnation proceedings. See *Schnabel v. County of DuPage*, 428 N.E.2d 671, 676 (Ill. App. Ct. 1981). Some of these rights-of-way consist of fee simple interests that may be transferred or used by the railroad for non-railroad purposes once the Commission authorizes abandonment of rail service; these rights-of-way are not affected by the takings clause aspect of this case. Other rights-of-way are specifically limited to railroad use and may revert to the original owner (or a successor in interest) if railroad use is discontinued. While these more limited interests, which do implicate the takings clause, take a variety of forms, the two most common types are the fee simple determinable and the easement. If the right-of-way is a fee simple determinable, title to the underlying land vests in the railroad and the grantor (or successor) retains only a reversionary interest (known as a "possibility of reverter"). See, e.g., *Oregon Dep't of Transp. v. Tolke*, 586 P.2d 791, 795-96 (Or. Ct. App. 1978). If the right-of-way is an easement, the owner of the servient tenement retains title to the underlying land and may be entitled to use the right-of-way in any manner that does not interfere with the railroad's use. See, e.g., *Veatch v. Culp*, 599 P.2d 526, 527-28 (Wash. 1979).¹³

¹³ Because an easement is a servitude, rather than an estate in land, it is not strictly accurate to speak of an easement "reverting"; rather, such interests "lapse" or are "extinguished." Nonetheless, for the sake of simplicity, we refer to the rights retained by any person in property that is subject to a railroad right-of-way as a "reversionary interest" and the event that causes these persons to regain unencumbered possession of the land as "reversion."

Many, but not all, of these rights-of-way are creatures of state law.¹⁴ In such cases, the interest retained by a property owner whose land is subject to a railroad right-of-way will depend upon the language of the instrument conveying, or of the state law creating, that right-of-way and on the applicable state law rules of construction. See, e.g., *Roeder Co. v. Burlington Northern, Inc.*, 714 P.2d 1170 (Wash. 1986); *Veach*, 599 P.2d at 527-28; *Tolke*, 586 P.2d at 795-97. See generally *Deed to Railroad Co. as Conveying Fee or Easement*, 6 A.L.R. 3d 973 (1966) (surveying state case law). State law also determines the circumstances that trigger the reversion of these rights-of-way. See, e.g., *Schnabel*, 428 N.E.2d at 675-77. In general, reversion depends upon abandonment by the railroad, and "in order to establish that a railroad has abandoned its right-of-way easement, it is necessary to prove actual relinquishment and the intention to abandon the use of the premises." *Id.* at 676. The element of intent to abandon may be inferred from the surrounding circumstances; mere non-use is probative of such intent but may not be sufficient in itself to demonstrate abandonment. *Id.* See generally *What Constitutes Abandonment of a Railroad Right of Way*, 95 A.L.R. 2d 468 (1964) (surveying state case law).

These state laws operate subject to the ICC's plenary authority to regulate railroad abandonments. See *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981). Absent a valid certificate of abandonment from the ICC, a state may not require a

¹⁴ A large proportion of existing rights-of-way were created by Congress during the nineteenth century through grants of public lands. See generally C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960); *Idaho v. Oregon Short Line R.R. Co.*, 617 F. Supp. 207, 210 (D. Idaho 1985). These interests may be subject to 43 U.S.C. § 912 (1982), which allows a state or local agency to use abandoned rights-of-way that were granted by the federal government as "public highways."

railroad to cease operations over a right-of-way. *New Orleans Terminal Co. v. Spenser*, 366 F.2d 160 (5th Cir. 1966). Nor may state law cause a reverter of a right-of-way prior to an ICC-approved abandonment. *Louisiana & Arkansas Ry. v. Bickham*, 602 F. Supp. 383 (M.D. La. 1985), *aff'd* 775 F.2d 300 (5th Cir. 1985). Instead, it is only after an unconditioned certificate has been issued that a right-of-way may be transferred or extinguished under state law. *State of Vermont and Vermont Ry. Inc.—Discontinuance of Service Exemption—In Chittenden County Vt.*, 3 I.C.C. 2d 903 (1987); see *Hayfield Northern R.R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633 (1984).

With this background in mind, we return to petitioner Beres's contention that the Trails Act Rules authorize a "taking" of her reversionary interest without compensation. Recall that under the Rules the Commission will not issue an effective abandonment certificate when the carrier and a qualified trail user have entered into a voluntary trail use agreement. Instead, the Commission will issue a Certificate of Interim Trail Use that allows the railroad to discontinue service without causing its right-of-way to lapse under state law.

Before the Commission, Beres argued that application of the Rules to the right-of-way on her property would deprive her of her reversionary interest under Washington law. The Commission noted this objection but rejected it on the following ground: "[s]ince the [amendment] provides that interim trail use under section [8(d)] shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature." 2 I.C.C. 2d at 600. This response may accurately describe the effect of § 8(d), but it does not resolve the question posed by petitioner Beres, namely, whether the postponement of a reversionary interest that would otherwise vest under state law constitutes a taking of private property for which just compensation must be made.

The Commission here advances two reasons why this question should be answered in the negative. First, although it concedes that a reversionary interest in land is "property" within the meaning of the fifth amendment, the Commission suggests that the Trail Act Rules do not authorize a taking of that property, because, "[i]n contrast to the railroad, which has a *vested* (i.e., present) right to dispose of its interest in the right-of-way . . . , the holder of a reversionary interest has nothing more than a *future interest* which might never mature and which is simply *postponed* in the event of a trail use arrangement." ICC Brief at 40 (emphasis in original). Leaving to the margin the error in the unqualified predicate for this argument,¹⁸ we notice that the Commission cites no authority for the proposition that government action that precludes the vesting of a reversionary interest does not constitute a taking of property. The purported proposition of law is manifestly contrary to the underlying economics—analogueous to saying that a lessor's interest in his property has not been "taken" when the term of a fully paid leasehold is extended indefinitely. It is therefore not surprising that a number of sources suggest it is unsound, particularly when the event that will trigger the reversion of the interest is imminent at the time of the appropriation. See *Lawson v. State of Washington*, 730 P.2d 1308, 1315-16

¹⁸ The Commission's assumption that all owners of reversionary interests have only a future interest in railroad rights-of-way is inaccurate. As we noted above, many rights-of-way are easements rather than interests in fee. See *supra* at 17. A landowner whose property is subject to a railroad easement may retain a vested interest in the underlying property, and indeed may enjoy a present right to use that property in any manner that is not inconsistent with the railroad's use. This vested right may be incompatible with the right-of-way's use as a trail. See *Veach v. Culp*, 599 P.2d 526, 528 (Wash. 1979); see also *Lawson v. State of Washington*, 730 P.2d 1308, 1315 (Wash. 1986) (noting that the owners of property bisected by railroad rights-of-way "presently own fee interests underlying the rights-of-way").

(Wash. 1986); 2 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.05[1] (Rev. 3d ed. 1985) (and cases cited therein); L. SIMES, LAW OF FUTURE INTERESTS 118-19 (2d ed. 1966); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 136 (2d ed. 1956); 1 RESTATEMENT OF LAW OF PROPERTY § 53 comment C (1936). Nor does the Commission offer support for its suggestion that the reversionary interests are not taken merely because they are postponed indefinitely rather than terminated outright. This proposition is similarly problematic; as the Supreme Court recently reminded, "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." *First Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987) (quoting *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting)).

Second, the Commission argues that Congress, in enacting § 8(d), expressly "preempted" any law providing for the termination of railroad easements upon the discontinuance of rail operations. Preemption of state law is neither the issue nor the answer, however. No one doubts that Congress has the authority to provide that rights-of-way no longer needed for rail use be converted to trail use, nor that state property laws to the contrary must be displaced by Congress's exercise of that authority. So much is fundamental. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding."); see also *Chicago & North Western Transp. Co.*, 450 U.S. at 319 ("[S]tate efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity."); *Glosmeyer v. Missouri-Kansas-Texas R.R. Co.*, 86-2508C (6), slip op. at 5-7, 14-15 (U.S.D.C. E.D. Mo., May 10, 1988) (rejecting a reversionary owner's claim that § 8(d) ex-

ceeds Congress's power under the Commerce Clause). The sole issue here in dispute is the ICC's determination that reversionary owners whose property interests are defeated by the preemptive effect of the Trails Act Rules upon state laws are not entitled to compensation. Cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) ("In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to [a private pond made navigable as a result of improvements made by the owner] if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.").

It is appropriate for the Commission to resolve this entirely separate "takings" question in the first instance, free of the error that caused it prematurely to truncate its analysis in the proceeding below. In order to do this, the Commission must consider the effects of the Trails Act Rules on the property rights of variously situated reversionary owners, rather than deny that such effects are legally cognizable.¹⁶ The Supreme Court has "gen-

¹⁶ In considering the effects of the Rules, the relevant comparison is between the rights of the owners before and after the application of the Rules and not, as the Commission appears to assume, the rights of the owners under the Rules before and after the cessation of rail service on the right-of-way. We therefore reject the Commission's suggestion that the Trails Act Rules do not work a taking on the ground that they "protect and preserve the reversionary interest throughout the interim trail use process." See ICC Brief at 41. As the Supreme Court of Washington recently noted in considering a takings challenge to state statutes that provided for trail use on abandoned railroad rights-of-way:

The argument that the statutes are valid because they do not 'eliminate' plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the statutes, they would not.

Lawson, 730 P.2d at 1313.

erally 'been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'" *Kaiser Aetna*, 444 U.S. at 175 (citation omitted). Its decisions do indicate, however, several factors, including "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government's action" that are of particular significance. *Id.* With respect to the last-mentioned factor, the Court has uniformly found that government action that causes a permanent physical occupation of real property amounts to a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). Accord *Kaiser Aetna*, 444 U.S. at 180 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation."). Most recently, the Court has determined that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." See *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145 (1987).

These general principles cannot, of course, resolve the question whether the conversion of a particular right-of-way to trail use constitutes a taking. In any individual case, the effect of trail use on the reversionary owner's property rights will depend, in part, on precisely what those rights are under relevant state law. For example, two state courts have found that trail use did not extinguish a railroad easement. See *Washington Wildlife Preservation, Inc. v. State of Minnesota*, 329 N.W.2d 543

(Minn. 1983); *Rieger v. Penn Central Corp.*, No. 85-CA-11, slip op. (Ct. App. Greene County, Ohio, May 21, 1985). In both cases, however, the easement at issue was not limited exclusively to railroad purposes. See *Washington Wildlife*, 329 N.W.2d at 546; *Reiger, supra* (easement created by prescription). Cases considering easements that were so limited by contract or statute have uniformly found that a change in use from rails to trails constitutes abandonment of the right-of-way. See *Lawson*, 730 P.2d at 1312; *Schnabel*, 428 N.E.2d at 673; *McKinley v. Waterloo R.R. Co.*, 368 N.W.2d 131, 133-35 (Iowa 1985) (easement acquired through condemnation subject to statute providing for reversion if railroad not operated for eight years); see also *Pollnow v. Wisconsin Dep't of Natural Resources*, 276 N.W.2d 738 (Wisc. 1979) (easement created by prescription). In addition, while a hiking trail may constitute a "public purpose" sufficient to preserve certain unconditioned rights-of-way, trail use may still extinguish an easement if it materially increases the burden on the servient estate. See *Lawson*, 730 P.2d at 1319 (Pearson, J., concurring and dissenting).¹⁷ Determining the effects of trail use on existing property interests, therefore, is necessarily a case specific process.

The Commission, with the support of NWF, seeks to sidestep this cumbersome inquiry into the effect of its Rules on the property rights of reversionary owners by stressing that the Rules serve an important rail regulatory purpose, namely, the preservation of rail transportation corridors for future rail use. They argue that this "rail banking" purpose distinguishes the Rules from a similar Washington state statute, recently invalidated by the Washington Supreme Court in *Lawson v. State of*

¹⁷ We decline NWF's invitation to declare *ex cathedra* that trail use is not "more noxious than rail use" or that it "enhances adjacent property values." See NWF Supp. Brief at 7. Indeed, the facts alleged by Ms. Beres suggest that in her case, trail use could have a dramatic adverse effect on her enjoyment of her property by transforming her private waterfront into a public beach.

Washington, 730 P.2d 1308 (1986), that simply authorized a transfer of railroad rights-of-way to public, including trail, use without providing for any resumption of rail service in the future. Wash. Rev. Code Ann. § 64.04.190 (West Supp. 1988). In response to this argument, Ms. Beres asserts that the rail banking rationale is a fiction because no railroad that has made the decision to go through an elaborate abandonment proceeding could realistically have any intent of reactivating rail service. Beres therefore asks us to disregard as pretextual the stated rail banking purpose of the Trails Act Rules.

Quite apart from the Rules, however, Congress specifically identified rail banking as a goal in the text of § 8(d).¹⁸ Moreover, and contrary to Beres's suggestion, there is at least some experience showing that a railroad that enters into an agreement for interim trail use may in fact intend to resume service in the foreseeable future. In *Chicago & North Western Transp. Co.—Abandonment Exemption—Guthrie and Dallas Counties, IA*, ICC No. AB-1 (Sub. No. 192X) (served May 20, 1987), for example, the Commission authorized interim trail use on a right-of-way that was adjacent to the site of a proposed coal-fired power station, reasonably projecting that if the power station were built, rail service would be reactivated in order to haul coal. We therefore decline to find that rail banking is necessarily a "fiction."

The Trails Act Rules do not, however, require any finding that resumption of rail service along a particular right-of-way is likely or even possible before authorizing conversion to trail use in derogation of the reversionary owner's expectancy. Nor do they provide for any procedure whereby the reversionary owner could challenge

¹⁸ Revised § 8(d) of the Trails Act states that it is "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." 16 U.S.C. § 1247(d).

such a finding. Instead, the Commission's rules rely entirely upon the carrier and the trail group to determine whether a right-of-way will be converted to trail use; so long as the railroad and the qualified trail operator agree, the Rules seem to contemplate trail use for an indefinite period of time, regardless of whether there is any realistic possibility that rail service will be resumed.

ICC and NWF suggest that the burden placed on reversionary owners by such use is comparable to that imposed on railroads by regulations that have been sustained by the courts.¹⁹ They point specifically to cases in which a carrier has been prohibited from abandoning service on an unprofitable line. The general rule, however, is that of *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920), that:

A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

See also *Bullock v. Railroad Comm'n of Florida*, 254 U.S. 513, 520-21 (1921). To be sure, the rule of *Brooks-Scanlon* has been qualified in later cases holding that a railroad's common carrier obligation may continue, even as to an unprofitable line, until the Commission has authorized its abandonment, without effecting a taking. See, e.g., *New Haven Inclusion Cases*, 399 U.S. 392, 491-92 (1970) (abandonment delayed seven years during liquidation proceedings).

Moreover, in *Lehigh & New England Ry. v. ICC*, 540 F.2d 71 (3d Cir. 1976), the court rejected a takings

¹⁹ As NWF suggests, the ICC's position here is in considerable tension with its determination that mandatory trail use of rights-of-way owned by railroads in fee would constitute a "taking" of the railroad's property interest. See *supra* at 7; 2 I.C.C.2d at 596-97.

clause challenge to an ICC order under § 1(16)(b) of the Interstate Commerce Act, which authorized the ICC, in certain circumstances, to direct a carrier to operate temporarily over the lines of another carrier that is unable or unwilling to provide essential rail service. The order in question provided that the directed carrier would pay no rent to the carrier that owned the track except in the unlikely event that the directed service proved to be profitable. Although the statute authorized such an arrangement for a maximum of 60 days or, if extended by the ICC for cause, an additional 180 days, the court found the taking claim "a close and difficult question." *Id.* at 82. Ultimately the court was persuaded that since a comparable postponement in the carrier's right to abandon would not be a taking, neither should be placing another carrier on the line for the same brief period. The court reasoned that "a railroad or its estate may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and private interests can be devised." *Id.* at 83; accord *Gibbons v. United States*, 660 F.2d 1227, 1236-38 (7th Cir. 1981).²⁰

None of these sources, however, supports the proposition that the owner of a right-of-way may be deprived indefinitely of the use of her property without compensation therefor. On the contrary, in each of the cases cited by the parties, a temporary imposition upon the property rights of a carrier was necessary in order to ensure the continuation of existing rail service. And in each case the temporary nature of the imposition was

²⁰ The public's interest in continued rail service has also been found sufficient to justify an ICC order requiring the trustee of a bankrupt railroad to give preference in the sale of a line to a bidder that intended to operate an excursion railroad and was willing to pay an amount equal to the high bid received from a non-operator. See *Reed v. Meserve*, 487 F.2d 646 (1st Cir. 1973); see also 49 U.S.C. § 10905 (railroad may be compelled either to accept operating subsidies or to sell the line to a carrier that will continue operation).

essential to put it on the regulation side of the narrow line separating reasonable regulations from compensable takings. We are unable, therefore, to conclude that existing precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future.

IV. CONCLUSION

In conclusion, we find the Commission's analysis of the takings issue raised by Ms. Beres insufficient to support its conclusion that the application of the Rules will never require compensation of reversionary owners. Moreover, in view of the Commission's decision to construe § 8(d) so as to prevent the condemnation of railroad property, we are reluctant to assume that the Commission's interpretation of the amended Trails Act was not affected by its analysis of the takings clause issue. A remand for further consideration is therefore in order. In determining whether the current Trails Act Rules may result in a taking of private property, the Commission should give special attention to situations where the right-of-way is strictly limited to railroad use and the restoration of rail service in the future is not foreseeable. In the event that the Commission concludes that a takings problem may result, it should also consider whether any modification of the Rules is appropriate and whether special procedures should be devised to facilitate the presentation of a property owner's claim for compensation.

INTERSTATE COMMERCE COMMISSION DECISION

Docket No. AB-265 (Sub-No. 1X)

STATE OF VERMONT AND VERMONT RAILWAY, INC. DISCONTINUANCE OF SERVICE EXEMPTION IN CHITTENDEN COUNTY, VT.

Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, *ET AL.*

v.

STATE OF VERMONT AND VERMONT RAILWAY, INC.

Decided: February 4, 1986

Applicants, (the State of Vermont, owner of the rail line, and the Vermont Railway, Inc., operator of the line), filed a notice of exemption under 49 C.F.R. 1152 Subpart F to discontinue service over the North Burlington branch rail line between milepost 124.687 and milepost 122.910, a distance of approximately 1.777 miles, in Chittenden County, VT. Notice was published in the *Federal Register* on January 6, 1986.¹ The exemption is to take effect on February 5, 1986.

The Trustees of the Diocese of Vermont, Burlington Lodge No. 916, Benevolent and Protective Order of Elks, and J. Paul Preseault and Patricia Preseault (Trustees), have filed a petition to stay the effectiveness of the exemption pending administrative review.

The Trustees have not presented justification for a stay in accordance with the criteria for deciding stay requests set for in *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Most importantly, the Trustees have not presented a substantial case that they will likely prevail on administrative review.

¹ 51 Fed. Reg. 454. Finance Docket No. 30702, which was consolidated with AB-265 (Sub-No. 1X) for determination, was dismissed in this notice.

The Trustees argue that they were not given any opportunity to present evidence and to cross-examine, or to rebut the evidence submitted by applicants. Specifically, the Trustees claim that they should be permitted a hearing and opportunity to rebut what they term a necessary finding — that resumption of rail service is possible over this line at some point in the future. The Trustees were given an opportunity to oppose the proposed exemption and did so. In fact, the Trustees made the argument that rail service could not be resumed over the line.² Moreover, such a finding is not statutorily required and was not made in this proceeding.

The Trustees further argue that the Commission misapplied the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). They contend that, by its terms, the Trails Act only applies with regard to the Commission in its administering the Railroad Revitalization and Regulatory Reform Act of 1976, and that no administration of any application or other matter under that act was involved here. The Trustees argument is incorrect. In *Ex Parte* No. 274 (Sub-No. 13). *Rail Abandonments — Use of Rights-of-Way as Trails*, served February 20, 1985, the Commission preliminarily interpreted that Trails Act conditions may be imposed in abandonment exemption proceedings including those filed under 49 C.F.R. 1152 Subpart F. The Commission affirmed this view in adopting final regulations at a public voting conference held on November 6, 1985. Here, the State of Vermont acquired the rail line after abandonment by the Rutland Railway Corporation.³ It agreed to lease the line for operation by the Vermont Railway, Inc., and applied to the Commission for the appropriate authority. The Commission approved that portion of the application to lease and operate the line by Vermont Railway, Inc., but dismissed the State of Vermont

² See Trustee's petition in Finance Docket No. 30702.

³ See *Rutland Ry. Corp. Abandonment of Entire Line*, 317 I.C.C. 393 (1962).

from the proceeding since the Commission concluded that, regardless of the purchase, the State was not a rail carrier subject to Commission jurisdiction.⁴ The State of Vermont was not issued a certificate of public convenience and necessity and did not become a carrier. Therefore, the Commission will not issue another abandonment certificate for this line, but may approve an application or exemption to discontinue service. Under the unusual circumstances of this case then, an exemption to discontinue service is the equivalent of an abandonment exemption for purposes of imposing a Trails Act condition. The Commission therefore properly considered the Trails Act in this proceeding.

Finally, the Trustees again make arguments previously considered by the Commission regarding: (1) the inapplicability of legislation occurring after 1975 to this line; and (2) whether there are restrictions or reversionary restraints on the title of this right-of-way under state law. The Trustees have not shown any exceptional circumstances that would require deviation from the general legal precept that the Commission is normally obliged to apply the law currently in effect. Similarly, the Trustees have not demonstrated that the opinion furnished by applicants on any title restrictions does not comply with the Commission's regulations. Moreover, the Trustees have not shown why findings on the validity of that opinion are necessary or appropriate for the Commission to determine whether a discontinuance of service exemption should be granted in this instance.

Additionally, the Trustees have not demonstrated that they will be irreparably harmed in the absence of a stay pending administrative review. The Trustees do not claim that continued rail service over this line is essential, since they have never used this service. By the Trustees own admission, construction of a bike path along this right-of-way probably could not resume for at least 6-8 weeks due to winter weather, which should give the

⁴ *State of Vt. and Vermont Ry., Inc., Acquisition and Op.*, 320 I.C.C. 330 (1963), as modified at 320 I.C.C. 609 (1964).

Commission ample time to complete administrative review. Furthermore, it is unclear whether the Trustees would be irreparably injured where a bike path is merely placed on the roadbed. Alternatively, applicants would be harmed by a stay since they would be delayed from being relieved of the financial burdens of a line on which they are earning no revenues.

In view of the above considerations, I conclude that a stay of the effective date of the exemption for discontinuing service would not be in the public interest.

This decision does not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.
2. This decision is effective on the service date.

By the Commission, Heather J. Gradison, Chairman.

JAMES H. BAYNE,
Secretary

This decision will be printed in the bound volumes of the I.C.C.2d series of printed reports at a later date.

EC

INTERSTATE COMMERCE COMMISSION

Docket No. AB-265 (Sub-No. 1X)

STATE OF VERMONT AND VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VT

Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.
v.
STATE OF VERMONT AND VERMONT RAILWAY, INC.

Decided July 7, 1987

Decision to allow Vermont Railway to use an exemption to discontinue service and the City of Burlington to make use of the right-of-way for trails affirmed.

Clarke A. Gravel for petitioners.
Jeffrey L. Amestoy, John K. Dunleavy, John T. Leddy, and John R. Pennington for respondents.

DECISION

BY THE COMMISSION:

We are denying a petition for reconsideration and/or clarification filed by J. Paul and Patricia Preseault, the Trustees of the Diocese of Vermont, and Burlington Lodge No. 916, Benevolent and Protective Order of Elks (collectively, "Trustees") of a

decision allowing Vermont Railway to use an exemption to discontinue service over a line of railroad.¹ The discontinuance, which was conditioned upon a trails use agreement, became effective February 15, 1986. The rail line, which is owned by the State of Vermont, was leased to the City of Burlington, VT, (City) for use as a walking and bicycle trail. The Trustees represent adjacent land owners with potential reversionary interests in the right-of-way. Vermont and the City replied to the Trustee's petition for reconsideration.

BACKGROUND

Vermont and Vermont Railway filed a Notice of Exemption to discontinue the latter's common carrier service obligations on this line under the procedures of 49 C.F.R. Part 1152. Those rules, which exempt carriers from formal application requirements under 49 U.S.C. §10903 for abandonment or discontinuance of lines that have moved no local traffic for a least two years, were adopted in *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983). (The proceeding was remanded for further consideration in *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), and the rules were reinstated in *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986).

¹ The North Burlington branch line at issue here extends between milepost 124.687 and milepost 122.910 in Chittenden County, VT. Vermont acquired the line as part of a larger purchase following the abandonment of all railroad properties by the Rutland Railway Corporation. See *Rutland Ry. Corp. Abandonment of Entire Line*, 317 I.C.C. 393 (1962). In *State of Vt. and Vermont Ry. Inc., Acquisition and Op.*, 320 I.C.C. 330 (1963), as modified at 320 I.C.C. 609 (1964), the Commission approved Vermont Railway's application to lease and operate the line and dismissed Vermont application to purchase the line, finding that Vermont was not a common carrier within our jurisdiction and that its acquisition of an abandoned line did not require prior approval under 49 U.S.C. §10901. Thus, the only authority necessary for these parties to abandon the line is authority for Vermont Railway to discontinue its operations.

On January 6, 1986, we served a *Federal Register* notice in which the Director of the Commission's Office of Proceedings accepted the notice of exemption and acknowledged a lease agreement between Vermont and the City under 16 U.S.C. §1247(d), (the Trails Act), to allow the City to use the right-of-way as a bicycle and pedestrian trail while preserving it for possible future rail use. The Director also dismissed Finance Docket No. 30702, the Trustees' petition for a determination that Vermont and the Vermont Railway, *de facto*, had abandoned the line in 1975 by removing part of the track without Commission approval.² In essence, the Trustees sought a determination that the Commission no longer had jurisdiction over the line from that date. On February 7, 1986, the Chairman denied the Trustees' petition for a stay pending administrative review, and the exemption became effective on February 5, 1986.

DISCUSSION AND CONCLUSIONS

In their petition for reconsideration, the Trustees allege generally that the exemption procedures did not allow them an adequate opportunity to present their case, and they request an opportunity to cross-examine or rebut Vermont's evidence. The Trustees' arguments are not persuasive because they have had the opportunity to submit evidence and argument opposing Vermont's requested relief in their petition for reconsideration and other pleadings. Moreover, there is no need for cross-examination

² The Trustees seek title to portions of the right-of-way based on reversionary interests and their status as owners of land adjacent to the right-of-way between milepost 123.342 and milepost 124.6875.

On June 1, 1981, the Trustees brought an action in State court to quiet title to the right-of-way. On April 19, 1985, the Supreme Court of Vermont affirmed a lower court's dismissal of the action, finding that a necessary determination of the line's status was within our exclusive jurisdiction. *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151 (1985).

or other evidentiary proceedings because no material issues of fact are in dispute.³

The Trustees also raise a number of Trails Act-related arguments.⁴ We have re-analyzed the Trails Act request in light of these criticisms and find that it satisfies the governing statutory requirements. Vermont and the City have entered into lease under which the right-of-way is available for use as a bicycle and pedestrian trail while rail service remains discontinued. The City will assume full responsibility for management of the right-of-way and for any legal liability arising out of the transfer or use and for payment of any taxes that may be levied or assessed. The right-of-way is available for restoration for railroad purposes, as required by the Trails Act. See *Trails Use*, *supra*.⁵

³ Vermont concedes that in late 1975 the Vermont Railway removed track structures between milepost 123.3416 and milepost 124.6875 without Commission approval.

⁴ They argue that the agency may apply the Trails Act only when it administers the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). That argument was considered and rejected in *Rail Abandonments — use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 601 (*Trails Use*).

⁵ They also contend that the Director failed to make a finding that the right-of-way could or would be used for future rail use. But the Trails Act does not require such a finding. The legislative history of the Trails Act, as well as its wording, shows that Congress did not intend to require a carrier to articulate a definite plan for resumption of rail service. In any event, the lease between Vermont and the City provides Vermont and the Vermont Railway with the right to terminate the lease, "to relay railroad tracks and resume railroad operations" over all or a portion of the right-of-way, to monitor any renovation or construction affecting the right-of-way, and prohibits raising or lowering the existing railroad grade without their approval. Furthermore, removal of part of the rail structures does not, as they argue, take the right-of-way outside the scope of the Trails Act. The legislative history of the Trails Act shows that Congress intended to:

protect railroad interests by providing that the right-of-way can be maintained for future railroad use *even though service is discontinued and tracks removed*, and by protecting the railroad

The Trustees' principal argument is that the Trails Act should not be applied to block their title claims. Based on the removal of part of the track from the right-of-way, the Trustees argue that the line was abandoned *de facto* in 1975, and that we should relinquish our jurisdiction over the line. To support their contentions, the Trustees cite *Modern Handcraft, Inc. — Abandonment*, 363 I.C.C. 969 (1981), where we granted abandonment requests by an adjacent landowner and a state transit authority over the objection of the owning railroad. In that case we issued a certificate of abandonment which we said could be used as evidence in the state court that there was no longer an overriding federal interest⁶.

Modern stands only for the proposition that a non-carrier can seek abandonment. It does not establish that the *de facto* cessation of service eliminates the requirement for a Commission order terminating the service obligation. See *Modern*, 363 I.C.C. at 972. To the contrary, a rail carrier may not abandon a rail line without our approval. See *Gibbons v. United States*, 660 F.2d 1227, 1233-34 (7th Cir. 1981). (The fact that a bankrupt carrier was cashless and unable to provide service did not vitiate the legal requirement to seek abandonment authorization to extinguish its common carrier obligation) and *Kansas City Area Transportation v. Ashley*, 555 S.W. 2d 9 (1977) (cited in *Modern*). The Commission's regulation of rail line abandonments is exclusive and plenary. *Chicago and N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). Thus, the Vermont Court was correct to defer to the Commission's authority in this regard. Unless and until an unconditioned certificate is issued and acted upon, the line remains within our jurisdiction. See *Hayfield Northern v. CNW*, 467 U.S. 622, 633-634 (1984).

interests from any liability or responsibility in the interim period.
(Emphasis added.)

See H.R. Rep. No. 98-28, 98th Cong. 1st Sess. 9 (1983), *reprinted in* (1983) U.S. Code Cong. & Ad. News 120. Moreover, in view of the lack of shipper complaints, we have found that the track removal does not vitiate our abandonment exemption authorization under §10505.

Indeed, the very purpose of the *Out of Service Lines* exemption was to lessen regulatory requirements for abandonment of lines over which there had been no service and no request for service for at least two years. If our jurisdiction could be terminated by *de facto* abandonment, then out of service lines could be abandoned without regulatory approval and the exemption would be unnecessary. Even if the track is physically removed, as here, neither the carrier's common carrier obligation or the agency's jurisdiction is terminated. The Commission can, and has on occasion, ordered carriers to restore such lines where there is a request for service. See, e.g., *Akron & B.B.R. Co. — Abandonment of Operation*, 239 I.C.C. 250 (1940).

Modern is further distinguishable from the instant proceeding because here there remain overriding federal interests embodied in the Trails Act: the development of trails and the preservation of railroad rights-of-way. Significantly, the Supreme Court recognized in *Hayfield*, 467 U.S. at 633, that the attachment of post-abandonment conditions to a certificate of abandonment could preclude termination of our jurisdiction. That is precisely the situation here, due to our imposition of Trails Act conditions.

The legislative history shows that Congress intended by enactment of the Trails Act to preserve our jurisdiction to protect railroad rights-of-way from title claims such as those of the Trustees. See H.R. Rep. No. 98-28 *supra*, at 8-9 and [1983] U.S. Code Cong. & Ad. News 119-120:

⁶ The Trustees also state that they and other adjacent landowners would be willing to grant an easement for the proposed bike-path. Therefore, they argue that the basic purposes of the Trails Act would be satisfied and issues of Federal law would be properly avoided, if we relinquished our jurisdiction over the right-of-way and allowed the Trustees' title claims to be decided in state court. The Trustees' willingness to grant a bike-path easement over the right-of-way does not satisfy the purposes of the Trails Act because it would not fulfill the Trail Act's dual purpose of trails use and preservation of the right-of-way for future rail use.

The key finding of the amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. *The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment.* (Emphasis added.)

Inevitably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act. See *Trails Use*, 2 I.C.C. 2d at 600. As we noted there, the statute and its legislative history "express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operation ***" (*Id.*) Thus, the dismissal of the Trustees' petition for an unconditional abandonment in Finance Docket No. 30702 was appropriate.

However, we do note that any alleged reversionary interests are suspended rather than terminated. As the Commission stated in *Trails Use*, 2 I.C.C. 2d at 600:

Interim trail use under §1247 shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and interests do not mature.

If trail use is terminated, a petition to reopen the abandonment proceeding must be filed for the agency to issue a certificate of abandonment to the railroad and to the trail user. After abandonment, reversionary rights would exist. Thus, reversionary interests in the subject property claimed by adjacent property owners have not been extinguished by any action taken to date.

This action will not significantly affect either the quality of the human environment or energy conservation, except that, to

the extent interim trail use is implemented, the quality of the human environment will be enhanced.

It is ordered:

1. The Trustees' petition for reconsideration is denied.
2. This decision is effective immediately.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

NORETA R. McGEE,
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

September 23, 1987

Docket No. AB-265 (Sub-No. 1X)

STATE OF VERMONT AND VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VT.

Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.
v.
STATE OF VERMONT AND VERMONT RAILWAY, INC.

NOTICE

A court action, entitled as shown below,
was instituted on or about September 18, 1987,
involving the above-entitled proceedings:

NO. 87-4117

J. PAUL PRESEAULT and PATRICIA PRESEAULT
v.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES OF AMERICA

before the United States Court of Appeals
for the Second Circuit.

NORETA R. McGEE,
Secretary

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and eighty eight.

Present: HON. WILFRED FEINBERG, Chief Judge
HON. GEORGE C. PRATT, Circuit Judge
HON. JOSEPH M. MCLAUGHLIN, District Judge*

J. PAUL PRESEALT and PATRICIA PRESEALT, Petitioner,)	
— V —)	
INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA)	Docket
Respondents,)	No.
STATE OF VERMONT, AGENCY OF TRANSPORTATION, and CITY OF BURLINGTON)	87-4117
VERMONT and VERMONT RAILWAY, INC.,)	
Intervenors.)	

A petition for review of an order of the Interstate Commerce Commission,

This cause came to be heard on the certified list of items comprising the record of the Interstate Commerce Commission and was argued by counsel.

UPON CONSIDERATION THEREOF, it is ordered, adjudged and decreed that the Petition for Review be and it hereby is denied in accordance with the opinion of this court, with costs to be taxed against the petitioner.

ELAINE B. GOLDSMITH, Clerk

By: EDWARD J. GUARDARO, Deputy Clerk

A TRUE COPY

ELAINE B. GOLDSMITH, Clerk

By: FRED M. CASSIDY, Deputy Clerk

ISSUED AS MANDATE: November 2, 1988

* for the Eastern District of New York, sitting by designation.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28 day of September one thousand nine hundred and eighty eight.

J. PAUL PRESEALT, PATRICIA PRESEALT,)	
Petitioner,)	
V.)	
INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA)	87-4117
Respondents.)	
STATE OF VERMONT, AGENCY OF TRANSPORTATION, and CITY OF BURLINGTON, VERMONT and VERMONT RAILWAY, INC.,)	
Intervenors.)	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners, J. Paul Preseault and Patricia Preseault,

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote to taken thereon.

ELAINE B. GOLDSMITH, Clerk

By: FRED M. CASSIDY

49 C.F.R. CH. X (10-1-85 Edition)
 Subpart F — Exempt Abandonments
 and Discontinuances of Service
 and Trackage Rights

§1152.50 — Exempt Abandonments and Discontinuances
 of Service and Trackage Rights

(a) A proposed abandonment or discontinuance of service or trackage rights of a railroad line is exempt from the provisions of 49 U.S.C. 10903-10905 if the criteria designated in this section are satisfied.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court or has been decided in favor of the complainant within the 2 year period. The complaint must allege (if pending) or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Commission has found: (1) that its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) that these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10505. A notice must be filed to use this class exemption. The procedures are set out in §1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10505(g)(2) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) Notice of Exemption.

(1) At least 10 days prior to filing a notice of exemption with the Commission, the railroad seeking the exemption must notify in writing (i) the Public Service Commission (or equivalent agency) in the State(s) where the line will be abandoned or the service or trackage rights discontinued, and (ii) the United States Department of Defense (Military Traffic Management Command). The notices shall name the railroad, describe the line involved, indicate the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Commission.

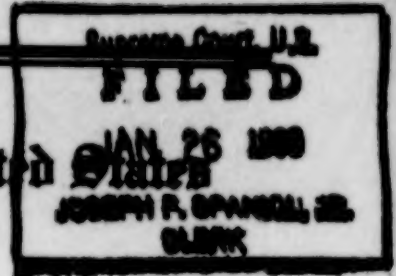
(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter "X") with the Commission at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in §1152.50(b), the information required in §1152.22(a)(1) through (4) and (8), and (e)(5), the level of labor protection, and a certificate that the notice requirement of §1152.50(d)(1) have been complied with.

(3) The Commission, through the Director of the Office of Proceedings, shall publish a notice in the FEDERAL REGISTER within 20 days after the filing of the notice of exemption. Petitions to stay the effective date of the exemption must be filed 10 days after publication and petitions for reconsideration must be filed within 20 days after publication. The exemption will be effective 30 days after publication (unless stayed pending reconsideration). If the notice of exemption contains false or misleading information, the use of the exemption is void ab initio and the Commission shall summarily reject the exemption notice.

(4) To address environmental issues and whether the right-of-way is suitable for other public purposes under 49 U.S.C. 10906, a party shall submit evidence to the Commission (Follow §1152.28(a)(2)) within 20 days of publication in the FEDERAL REGISTER. A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

OPPOSITION BRIEF

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1988



J. PAUL PRESEAUT, et ux.,
Petitioners,
 v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

**On Petition for a Writ of Certiorari to the
 United States Court of Appeals
 for the Second Circuit**

BRIEF IN OPPOSITION

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1076

J. PAUL PRESEAUULT, *et ux.*,
v. *Petitioners,*

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 1898, the Vermont legislature chartered the Rutland-Canadian Railroad Co. ("Rutland-Canadian") to build a new railroad from Burlington to the Canadian border. 1898 Vt. Acts No. 160 (App. B).¹ The Rutland-Canadian then proceeded to acquire its right-of-way, both by purchase and through the eminent domain powers delegated to it by the Vermont legislature. On August 14, 1899, commissioners appointed by the Vermont Supreme Court

¹ The most recent codification of Vermont's railroad condemnation statutes then in effect was at Vt. Stat. §§ 3808-32 (1894). Extracts appear at App. A.

made awards to several property owners, including those from whom the Preseaults claim succession.²

In 1900, as the new line approached completion, the Rutland-Canadian and several other subsidiaries of the Rutland Railroad Co. ("Rutland") were consolidated into the Rutland. 1900 Vt. Acts No. 153 (App. D). In 1950, the old Rutland Railroad Co. was succeeded by the Rutland Railway Corp. ("Rutland Railway").³ The new corporation operated the railroad, including the former Rutland-Canadian segment, until a strike in late 1961 prompted management to seek liquidation. In *Rutland Ry. Corp.—Abandonment of Entire Line*, 317 I.C.C. 393 (1962), the Interstate Commerce Commission ("ICC") authorized the Rutland Railway to abandon its entire system, subject to a condition that it offer to sell viable segments for continued railroad service.

Shortly thereafter, the Vermont legislature authorized purchase of viable sections of the Rutland Railway for lease to and operation by short line operators. 1963 Vt. Acts No. 162 (App. E). In late 1963, the ICC approved the first such arrangement, for the Bennington-Burlington segment. *State of Vermont and Vermont Ry., Inc.—Acquisition and Operation*, 320 I.C.C. 330 (1963), modified 320 I.C.C. 609 (1964). Actual conveyance of the Bennington-Burlington line to the State of Vermont ("the State") followed on January 1, 1964 and the lease to Vermont Railway, Inc. ("VTR")⁴ took effect on January 6, 1964.

² See August 14, 1899 Commissioners' Award to the William H. H. Barker Estate, *et al.*, App. C.

³ The Rutland Railway's corporate history is briefly chronicled in *Rutland Ry. Corp.—Abandonment of Entire Line*, 317 I.C.C. 393, 397-98 (1962). See also *Rutland R.R.—Reorganization*, 271 I.C.C. 44 (1948), modifying 267 I.C.C. 153 (1947) and 267 I.C.C. 89 (1946).

⁴ Pursuant to Sup. Ct. R. 28.1, VTR notes that it is affiliated with the Clarendon & Pittsford Railroad Co., with which it shares common ownership and management.

To maintain railroad service to an industry in the northern part of Burlington, a 1.8 mile stub of the former Rutland-Canadian was included in the 1964 purchase and lease. See *Rutland Ry. Corp.—Abandonment*, *supra*, 317 I.C.C. at 432-33. This included the parcel in which the Preseaults now claim to have succeeded to a reversionary interest. In 1975, several years after the industry had relocated, VTR found itself in need of materials for track repairs. Accordingly, with the State's permission (in its capacity as landlord), VTR removed the northernmost 1.35 miles of remaining trackage—including the trackage in the immediate vicinity of the Preseault property. At the time, neither the State nor VTR applied to the ICC for permission to discontinue service over or abandon the line. However, because the only customer on the branch had relocated, the ICC did not receive any shipper complaints.

In 1981, a group of abutting landowners (including the Preseaults) brought action in state court against the State, VTR and the City of Burlington ("the City"), seeking to quiet title to the right-of-way in the abutters' favor. In 1985, the Supreme Court of Vermont affirmed dismissal of the action for lack of subject matter jurisdiction, holding that the state court's determination necessarily would have to involve adjudication of the issue of abandonment, a matter within the exclusive and plenary jurisdiction of the ICC under federal law. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985).

In June 1985, the State, through its Agency of Transportation, joined by VTR, agreed to lease the 1.8 mile North Burlington branch to the City for interim use as a bicycle and pedestrian path (App. H). In July 1985, the Preseaults and two other abutters filed with the ICC a "Petition by Non-carriers for a Determination of Exemption from the Jurisdiction of the Interstate Commerce Commission and/or Finding of *De Facto* Abandonment."

(ICC Finance Docket No. 30702.) The State protested and, joined by VTR, filed a joint reply. The City also protested and filed a reply.

In November 1985, prior to the ICC's having taken any action in Finance Docket No. 30702, the State and VTR jointly filed with the ICC a "Verified Notice of Exemption" (ICC Docket No. AB-265 [Sub-No. 1X]) under 49 C.F.R. § 1152.50. The exemption notice sought formal ICC permission to discontinue service over the North Burlington branch and make the involved properties available to the City of Burlington under the 1983 amendments to the National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act") during the period of time that rail service remained discontinued.

On January 2, 1986, after allowing the abutters' motion to consolidate, the ICC granted the exemption petition in Docket No. AB-265 (Sub-No. 1X), permitting formal discontinuance of railroad service and conversion to trail use to become effective on February 5, 1986. 51 Fed. Reg. 454. At the same time, the ICC dismissed the abutters' petition in Finance Docket No. 30702. *Id.* On July 7, 1987, the ICC denied the abutters' petition for reconsideration and/or clarification. *State of Vermont and Vermont Ry., Inc.—Discontinuance of Service Exemption—In Chittenden County, Vt.*, 3 I.C.C.2d 903 (1987). The Preseaults, by now alone, next filed a petition for review in the Court of Appeals. This resulted in affirmance of the ICC's decision. *Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

The Preseaults claim that the decision below is in conflict with *National Wildlife Federation v. ICC*, 850 F.2d

694 (D.C. Cir. 1988).⁵ Respondents submit that, despite some differences in the reasoning of the two courts, the Preseaults have failed to demonstrate any actual conflict in their holdings.

In *National Wildlife*, the District of Columbia Circuit viewed the ICC as having too readily concluded that the Trails Act never could pose any takings issues as applied to railroad abutters. Accordingly, it remanded the ICC's Trails Act regulations for further consideration of this question but did attempt to resolve it. (For its part, the Second Circuit in *Preseault* simply went one step further and accepted the abutters' invitation to resolve the question—albeit in favor of the Trails Act's constitutionality.) Although the District of Columbia Circuit tended to view the Trails Act as serving predominantly recreational objectives and indicated that such objectives were perfectly acceptable under the Commerce Clause, it questioned whether such objectives were sufficiently related to traditional railroad regulatory purposes to justify a determination that application of the Trails Act would never raise a "takings" issue. 850 F.2d at 708.

However, as the Second Circuit recognized below, the answer to the concern expressed by the District of Columbia Circuit in *National Wildlife* is that preservation of a corridor for current rail use or for future rail use is fundamentally the same:

The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus petitioners' reversionary interest, if any, is not postponed any more by the operation

⁵ *National Wildlife* involved review of the ICC's final rules implementing the Trails Act. See *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986).

of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction.

Preseault, supra, 853 F.2d at 151. Respondents agree: as accomplished by the Trails Act, rail corridor preservation does not result in any significant increased burden—and probably, in most cases, a much lesser burden—than continued rail operation or simply leaving track and ties in place and discontinuing service without abandoning the right-of-way. To the extent there is a change in burden due to interim use as a recreational trail, that change is fully reasonable as a means of defraying the burden on interstate commerce that otherwise would result from preservation of the corridor for future use.

II. BECAUSE THE 1983 AMENDMENT TO THE NATIONAL TRAILS SYSTEM ACT, 16 U.S.C. § 1247(d), INVOLVES A PROPER EXERCISE OF FEDERAL REGULATORY POWER, ITS APPLICATION DOES NOT PRESENT A CONSTITUTIONAL QUESTION UNDER THE COMMERCE CLAUSE.

A. As a Type of Public Highway, Railroads Have Long Been Recognized as a Proper Subject for Comprehensive Governmental Regulation.

From the earliest days of the industry, railroads have been recognized as a type of public highway. It follows "that property, taken for [a railroad's] use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway. . . ." *White River Turnpike Co. v. Vermont Cent. R.R.*, 21 Vt. 590, 594 (1849). See also *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 641, 657 (1890) ("[A] railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation").⁶

⁶ In this particular case, the pervasive public interest is underscored by the fact that both the general railroad law in effect in

Governmental regulation of the discontinuance and abandonment of viatic easements used by the public appears to have a long history. "At common law, a highway could be discontinued only by license of the king, obtained after an inquest upon a writ of *ad quod damnum*." 3 Nichols on Eminent Domain, § 9.33[2] (J. Sackman 3rd ed. 1985). In this tradition, it has been black letter Vermont law for almost 175 years that there can be no discontinuance of a public highway in the absence of compliance with applicable statutory procedures. See *Capital Candy Co., Inc. v. Savard*, 135 Vt. 14, 16, 369 A.2d 1363, 1365-66 (1976) and cases cited therein; *Fisher v. Beeker*, 1 Brayt. 75 (Vt. 1816). The Vermont legislature has seen fit to protect both highway and railroad rights-of-way against inadvertent loss from adverse user. See Vt. Stat. Ann. tit. 19, § 1102 (1987) (highways); Vt. Stat. Ann. tit. 30, § 705 (1986) (railroads).⁷

Vermont at the time of the Rutland-Canadian condemnation (Vt. Stat. § 3749 [1894] [App. A]) and the Rutland-Canadian charter (1898 Vt. Acts No. 160, § 10 [App. B]) contained explicit reservations of the power to enact amendatory legislation. The general railroad law also reserved to the State an option to convert railroad rights-of-way to public ownership. See Vt. Stat. § 3746 (1894) (App. A).

⁷ *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 318 A.2d 652 (1974)—a case much touted by the Preseaults—is not at all anomalous on any of these points. First, *Dessureau* was decided on an agreed statement of facts and issues, including a stipulation that the railroad right-of-way at issue had, in fact, been abandoned. Accordingly, there was no occasion for the court to analyze the effect of ICC jurisdiction or whether interim conversion of a railroad right-of-way to another viatic use would have any effect on reversionary interests. Second, the Vermont court's reaffirmation in *Dessureau* of the principle that railroads are a type of public highway undermines the Preseaults' arguments: if Vermont law permits the conversion of ordinary public highways to trail status without payment of additional compensation to abutters (see discussion *infra* at 18-19), then it is illogical to suggest that

B. Congress Has Plenary Power Under the Commerce Clause to Regulate Railroad Abandonments and Discontinuances of Service, Even Though Many Railroads Were Constructed Under State Authority Prior to Actual Assertion of Federal Jurisdiction.

The Preseaults' attempt to drive a wedge between present federal law regulating railroad abandonments and the property interests acquired by the Rutland-Canadian in its 1899 condemnation conducted under Vermont law is at odds with the history of federal regulation and fundamental public policy.

Although federal regulation of railroads began to assume its present form in 1887 with passage of the Interstate Commerce Act, ch. 104, 24 Stat. 379, Congress did not actually extend the federal regulatory scheme to include comprehensive oversight of new railroad construction and abandonment of existing railroads until the Transportation Act of 1920, ch. 91, § 402, 41 Stat. 456, 477 (1920). Once Congress asserted federal jurisdiction, however, this Court had little difficulty in upholding the newly expanded system of regulation as a legitimate exercise of "the paramount power of Congress to regulate interstate commerce." *Colorado v. United States*, 271 U.S. 153, 165 (1926).⁸

In any event, the growth and development of Commerce Clause jurisdiction had been heralded many years prior to the Rutland-Canadian's 1899 condemnation. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court recognized that the "regulation of commerce" committed to Congress by the Constitution encompassed the

there is some state law impediment to converting railroads—also a type of public highway—to trail status under 16 U.S.C. § 1247(d).

⁸ The Transportation Act of 1920 also added a new provision to the Interstate Commerce Act which expressly invalidated state remedies inconsistent with any ICC order or prohibited under any provision of the Interstate Commerce Act. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 329 n.16 (1981).

entire field of interstate commerce with all its means, instruments and appliances, extending even within the jurisdictional boundaries of individual states. By 1887, this Court could summarize the development of Commerce Clause jurisdiction over the railroad industry as follows:

[In former times] many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject.

California v. Central Pac. R.R., 127 U.S. 1, 39. The likelihood of greater and greater federal regulation was also apparent to legal scholars of the period. See, e.g., 2 I. Redfield, *The Law of Railways* 505-15 (J. Kinney 6th ed. 1888). Almost a decade prior to the Rutland-Canadian condemnation, the Vermont Supreme Court noted that

[Interstate] commerce is solely regulated by Congress and when parties make contracts to engage in interstate commerce they are held to do so upon the basis and with the understanding that changes in the law applicable to contracts may be made. There can in the nature of things be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject, which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority.

Fitzgerald v. Grand Trunk R.R., 63 Vt. 169, 173, 22 A. 76, 77 (1890).⁹ In short, to the degree that the exercise

⁹ Cf. *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 466-68 (1985) (implication of vested rights especially inappropriate where [1] there was explicit reservation of legisla-

of federal jurisdiction places any burden on servient estates subject to railroad easements, that burden, as a matter of law, must be deemed an intrinsic part of the railroad use itself.

C. The Trails Act Is a Proper Exercise of Congress' Power Under the Commerce Clause.

In enacting the 1983 amendment to the National Trail Systems Act (now codified at 16 U.S.C. § 1247[d]), Congress manifested concern not only with the benefits to be had from interim trail use of railroad rights-of-way but also with preserving the public and quasi-public investment in the national rail network:

Section 208 amends section 8 of the act to encourage the development of additional trails in conjunction with the provision of the Railroad Revitalization and Regulatory Reform Act of 1976. This reflects concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes. This appears to be true despite the fact that *these efforts have also been to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.*

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. . . .

H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), reprinted in 1983 U.S. Code Cong. & Ad. News 119-20

tive power to alter, amend or repeal, and [2] the field at issue was railroading, with its long history of pervasive governmental regulation).

(emphasis added). As the ICC recognized in its decision below,¹⁰ the State, VTR and the City have demonstrated a serious commitment to preserving the North Burlington branch as a rail corridor:

[T]he lease between Vermont and the City provides Vermont and the Vermont Railway with the right to terminate the lease, 'to relay railroad tracks and resume railroad operations' over all or a portion of the right-of-way, to monitor any renovations or construction affecting the right-of-way and prohibits raising or lowering the existing railroad grade without their approval.

Id., 3 I.C.C.2d at — n.5.¹¹

The Preseaults argue that *Nollan v. California Coastal Commission*, 483 U.S. —, 107 S.Ct. 3141 (1987), stands for the broad proposition that courts now must give substantially less deference to rationalizations put forth by the government in defending regulations alleged to involve takings. Petition at 18. This argument is misdirected. *Nollan* is not a Commerce Clause case. It does not signal some vast new curtailment of federal authority over the instrumentalities of interstate commerce. Rather, it involves traditional analysis of a state's general police powers—as applied to strictly private property, not already encumbered by a public servitude—when those police powers are alleged to conflict with the Fifth Amendment. As the court below recognized, the appropriate test in Commerce Clause cases is "whether the measures adopted by [C]ongress in 16 U.S.C. § 1247(d) are reasonably adapted" to the purposes of

¹⁰ *State of Vermont and Vermont Ry., Inc.—Discontinuance of Service Exemption—In Chittenden County, Vt.*, 3 I.C.C.2d 903 (1987), *aff'd sub nom. Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988).

¹¹ Excerpts from the lease appear at App. H.

The Preseaults now appear to concede the significance of lease provisions permitting termination of trail use if the rail carrier decides to resume rail service. Petition at 20, n.6.

the statute. *Preseault*, *supra*, 853 F.2d at 149. *Accord* *Glosemeyer v. M-K-T R.R.*, 685 F.Supp. 1108, 1118 (E.D. Mo. 1988), *appeal pending*, No. 88-1863-EM (8th Cir. argued Dec. 12, 1988).

III. BECAUSE THE TRAILS ACT DOES NOT INVOLVE ANY NEW TAKING OF PROPERTY, ITS APPLICATION DOES NOT PRESENT A CONSTITUTIONAL QUESTION UNDER THE JUST COMPENSATION CLAUSE.

A. When Land Is Taken for a Highway or Railroad, the Distinction Between Taking an Easement and Taking the Fee Has no Practical Effect on the Amount of Just Compensation.

Even assuming, *arguendo*, the correctness of the Preseaults' contention that the Rutland-Canadian's 1899 condemnation proceedings resulted in taking an easement over the condemned lands rather than a fee interest,¹² it

¹² Neither the State, VTR nor the City has ever conceded that the Rutland-Canadian took something less than a fee interest. The Rutland-Canadian's charter, in broad terms, granted it "the right of eminent domain." 1898 Vt. Acts No. 160, § 1 (App. B). Vermont's general railroad condemnation statute—in effect since the late 1840's—provided that upon payment of the damages appraised by court-appointed commissioners, a railroad should "be deemed to be seized and possessed of the land or other property appraised. . . ." Vt. Stat. § 3819 (1894) (App. A) (emphasis added). Under ordinary canons of statutory construction, use of the words "seized" and "land" would appear to authorize a fee taking: (1) an 1829 Vermont case had held that "seisin" had "an established technical meaning, applicable to lands, and import[ing] an estate in fee" (*Hastings v. Webber*, 2 Vt. 407); and (2) since at least 1840, the term "land" had been statutorily defined to include "land, tenants and heridaments and all rights thereto and interests therein." See Vt. Stat. § 9 (1894). Although the mid-nineteenth century Vermont Supreme Court entertained doubt as to the constitutionality of a statute's authorizing a taking in fee (*Quimby v. Vermont Cent. R.R.*, 23 Vt. 387, 393 [1851]), the clear weight of modern authority is that no constitutional impediment exists to a statute's authorizing the taking of the fee in condemnation, leaving no reversionary in-

does not follow—as the Preseaults appear to assume—that there would have been any diminution in the amount of damages awarded to the owners of lands crossed by the railroad:

[W]hen land is taken for such purposes as a highway or a railroad (which require a permanent and substantially exclusive occupation of the surface), the distinction between a taking of the fee and of the easement has no practical application in the determination of the compensation to be assessed for the land actually taken. While the damages to the owner's remaining land may be less if the use of the land taken is limited by the nature of the easement, the interest remaining in the owner of the fee in the land taken is in such a case of nominal value, and he is awarded the same measure of compensation for the land actually taken as if the fee was acquired by the condemning party, namely, the full market value of the land.

4 Nichols on Eminent Domain § 12.41[2] (J. Sackman 3rd ed. 1985).

As to compensation for so-called "severance damages" (*i.e.*, the loss in value that portion of the condemnee's lands not actually taken), it is difficult to imagine a more intrusive taking than for a railroad. Although the

terest in the former owner. 3 Nichols on Eminent Domain §§ 10.1 [highways] and 11.1 [railroads] (J. Sackman 3rd ed. 1985). *Cf.* *City of Winooski v. State Highway Board*, 124 Vt. 496, 207 A.d 255 (1965) (fee taking for highway).

Even in its most cautious moments in the mid-nineteenth century, the Vermont court had no difficulty characterizing the effect of a railroad condemnation as the taking of a very special kind of easement, the enjoyment of which was to be "much the same as that of an owner in fee." *Jackson v. Rutland & B. R.R.*, 25 Vt. 150, 159 (1853). *Accord* *Connecticut & P. Rivers R.R. v. Holton*, 32 Vt. 43, 47 (1849). The Vermont court also recognized that a conveyance to a railroad ordinarily passed the fee of the land, even if tendered under threat of eminent domain proceedings. *Page v. Heineberg*, 40 Vt. 81, 86 (1868).

owners of lands along an ordinary public highways are said to enjoy a variety of abutters' rights (most notably, a right of reasonable access to the highway from their adjoining lands),¹³ a railroad, from a property law aspect, is more akin to a modern, limited access highway. Accordingly, except to the degree mitigated by explicit statutory or contractual provisions for farm and other private crossings,¹⁴ abutters along a railroad lost—and were compensated for—all rights of access to the lands within the boundaries of the railroad. *Jackson v. Rutland & B. R.R.*, *supra*, 25 Vt. at 159 (railroad may exclude all concurrent occupancy by former owners, "in any mode and for any purpose"). *Accord Connecticut & P. Rivers R.R. v. Holton*, *supra*, 32 Vt. at 47; *Troy & B. R.R. v. Potter*, 42 Vt. 265, 274 (1869). In sum, as the Supreme Court of Ohio has put it, "[t]here can be no greater burden on property than that which results from [a railroad's] appropriation of a right to exclusive use." *State ex rel. Fogle v. Richley*, 55 Ohio St.2d 142, 146, 378 N.E.2d 472, 475 (1978).

B. The Taking of Land for a Highway or Railroad Subsumes a Variety of Public Uses, Not Just the Particular Use Contemplated at the Time of Condemnation.

As noted earlier, Vermont law holds that a railroad is a type of public highway. "[P]roperty, taken for its use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway." *White River Turnpike Co. v. Vermont Cent. R.R.*, *supra*, 21 Vt. at 594. Even where title is in the name of

¹³ See generally 3 Nichols on Eminent Domain § 10.221 (J. Sackman 3rd ed. 1985); *Abell v. Central Vt. Ry., Inc.*, 118 Vt. 189, 102 A.2d 847 (1954).

¹⁴ The lease from the State and VTR to the City recites that it is subordinate to existing crossing and utility agreements and requires the City, during the period of interim trail use, to maintain overpasses, underpasses, fences, etc. See App. H.

a privately-owned railroad corporation, the right-of-way is deemed to be held in trust for and devoted to public use. *Drouin v. Boston & M. R.R.*, 74 Vt. 343, 354, 52 A. 957, 959-60 (1902); *Osgood v. Central Vt. Ry.*, 77 Vt. 334, 344, 60 A. 137, 140 (1905).¹⁵

Inherent in "public highway" status is the possibility of adaptation to a variety of public uses:

The power of the public over highways is not confined to their use for the sole purpose of travel. Many things may be done therein for the promotion of the public convenience and health, such as laying water pipes, constructing drains and sewers, making reservoirs, and many other acts which the public authorities in a judicious manner and with proper care, having reference to the rights of adjoining proprietors and the owners of the fee of the land, if such proprietors are incidentally affected injuriously thereby, or the owner of the fee sustains a technical damage, the law furnishes no remedy therefor.

West v. Bancroft, 32 Vt. 367, 371 (1859). See generally Vt. Stat. Ann. tit. 19, § 1111 (1987) (permits for incidental uses of highway rights-of-way) and Vt. Stat. Ann. tit. 30, §§ 2501-30 (1986) (telegraph, telephone and electric wires along highways and railroads).

A change to another public use than that at first contemplated ordinarily does not entitle a condemnee or his successors to be compensated a second time. For example, in *Brainard v. Missisquoi R.R.*, 48 Vt. 107 (1874), a pre-existing plank road right-of-way was converted to a railroad right-of-way. The Vermont Supreme Court rejected the landowner's claim that the railroad was liable to pay him a second time for the land taken:

[W]hen the railroad company regularly located its road over the plank road, it became invested with all

¹⁵ Indeed, at the time of the Rutland-Canadian condemnation, the possibility of eventual State acquisition of railroad rights-of-way was adverted to by statute. See Vt. Stat. § 3746 (1894) (App. A).

the rights that the plank road company had in the premises over which it ran; and the plank road company having paid the plaintiff for the rights that they had acquired therein, the railroad company is under no obligation, either legal or equitable, to pay the plaintiff therefor a second time.

48 Vt. at 114. See also *Proctor v. Central Vt. Pub. Serv. Corp.*, 116 Vt. 431, 433, 77 A.2d 828, 830 (1951) (railroad condemnation not confined strictly to railroad purposes, but carried inherent in it rights in favor, among others, of electric light companies); *State ex rel. Fogle v. Richley*, *supra* (whether use following condemnation by a railroad is limited to use as a railroad or extends to a public highway purpose is immaterial under Ohio law, for the singular objective is to facilitate public transportation, and there can be no detriment to the fee owner, whose predecessor-in-title was fully paid); *State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 547 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983) (trail use of a railroad right-of-way is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estate).

IV. APPLICATION OF THE TRAILS ACT DOES NOT RAISE A CONSTITUTIONAL ISSUE UNDER THE DUE PROCESS CLAUSE.

A. Nonuser or Removal of Railroad Tracks Does Not Result in Automatic Reversion of the Underlying Railroad Right-of-Way.

In their quest for a constitutional issue, the Preseaults appear to argue that, but for the interposition of federal jurisdiction, the 1975 removal of the railroad tracks would have entitled them to automatic reversion of the railroad right-of-way.

This contention ignores a number of relevant authorities. In *Brainard v. Missisquoi R.R.*, *supra*, the Vermont

Supreme Court rejected a landowner's contention that substitution of a railroad for a plank road "annihilated" the easement originally condemned by the plank road company. 48 Vt. at 114. In *Stevens v. MacRae*, 97 Vt. 76, 80, 122 A. 892, 894 (1923), the Vermont court held that "[t]he mere lapse of time and non-user for railway tracks for the length of time shown by the record [20 years] did not in themselves operate in law as an abandonment of possession." The *Stevens* holding is consistent with the general rule of Vermont property law that "mere nonuse, no matter how long, will not serve to defeat an easement." *Timney v. Worden*, 138 Vt. 444, 447, 417 A.2d 923, 925 (1980). Or, as stated in *Sabins v. McAllister*, 116 Vt. 301, 76 A.2d 106 (1950):

One who acquires title to an easement [created by deed] has the same right of property therein as an owner of the fee and it is not necessary that he should make use of this right in order to maintain his title. In order to establish an abandonment there must be, in addition to non-user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future.

116 Vt. at 308, 76 A.2d at 109.¹⁶

B. Application of the Trails Act Is Consistent With Vermont Law.

The Preseaults' suggestions to the contrary, preservation of the North Burlington rail corridor through interim trail use is not an aberration under Vermont law, either as it stood in 1899 or as it stands today. The Vermont Supreme Court repeatedly has recognized the pro-

¹⁶ The fact that an easement resulted from a taking by condemnation rather than from a grant by deed does not vary these rules. Cf. *Capital Candy Co. v. Savard*, *supra*, 135 Vt. at 16-17, 369 A.2d at 1366.

priety of a railroad's leasing a part of its roadway, "if it does not thereby cripple its efficiency in the discharge of its duties to the public." *Bacon v. Boston & M. R.R.*, 83 Vt. 421, 437, 76 A. 134 (1910) and cases cited therein. Land leased by a railroad remains in the railroad's constructive possession *vis-a-vis* abutting landowners and will not be deemed to have been abandoned. *Rutland R.R. Co. v. Chaffee*, 71 Vt. 84, 90, 42 A. 984, 986 (1899). Cf. *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 468 (1875) (a railroad has exclusive control of all land within the limits of its roadway and, while not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, it may license the erection of buildings for its convenience and the convenience of others) (case involving Vermont law).¹⁷ In 1982, the Vermont legislature specifically directed that, following cessation of railroad operations, title to publicly-owned railroad rights-of-way should be retained "for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes." Vt. Stat. Ann. tit. 30, § 711 (1986).¹⁸

Vermont's highway statutes also undermine the Pre-seaults' contention that Vermont law presents an impediment to placing railroad rights-of-way in trail status. As can readily be appreciated, preserving the rights-of-

¹⁷ In 1984 Vt. Acts (1983 Adj. Sess.) No. 107 (one in a series of statutes going back to the State's 1964 purchase of sections of the Rutland Railway), the legislature renewed the authority of the Secretary of Transportation, as agent for the State, to enter into leases of the former Rutland Railway properties. This authority has been carried forward in Vt. Stat. Ann. tit. 5, § 3406(a) (Supp. 1988) (App. I).

¹⁸ Since the ICC's decision in this case, the Vermont legislature has further endorsed railbanking of State-owned railroad property. See Vt. Stat. Ann. tit. 5, § 3408 (Supp. 1988) (App. I).

It should be noted that Vermont law recognizes establishment of bicycle routes as a transportation purpose. See Vt. Stat. Ann. tit. 19, §§ 2301-10 (1987).

way of lightly trafficked railroads at reasonable cost presents many of the same problems as preserving highway rights-of-way not presently required for vehicular traffic. Accordingly, Vermont highway law supplies a practical remedy that avoids the Hobson's choice of maintaining an underutilized highway or suffering its abandonment and irrevocable loss to the public. Under Vt. Stat. Ann. tit. 19, § 775 (1987) (App. J), a local government can designate a discontinued highway as a trail, in which case the right-of-way is continued at the same width. While such trails remain open to public travel, the local government is freed from responsibility for maintenance. See Vt. Stat. Ann. tit. 19, §§ 301(8), 302(a)(5), 310(c) (1987). In affirming the validity of this statute, the Vermont Supreme Court has held that a highway's reduction to trail status does not entitle abutting landowners to compensation. *Perrin v. Town of Berlin*, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Vt. Stat. (1894)

SEC. 9. The words "land," "lands," and "real estate," shall include lands, tenements and hereditaments, and all rights thereto and interests therein; and pews or slips in places of public worship shall be treated as real estate.

* * *

SEC. 3743. Railroad companies organized or incorporated under the laws of this state shall be subject to the provisions of this title so far as consistent with their respective charters.

SEC. 3744. The provisions of this title which impose upon a railroad corporation any duty, obligation or liability shall apply to persons having the possession, control or management of a railroad, or of the engines and cars running thereon, as lessees, assignees, trustees or in any other capacity.

SEC. 3745. No person shall acquire title to lands belonging to a railroad corporation, where such lands lie within the limits of the roadway of such corporation, as recorded in the town clerk's office, by reason of adverse possession.

SEC. 3746. The state may, at any time during the continuance of the charter of a railroad corporation, after the expiration of twenty years from the opening of its railroad for use, purchase of the corporation the railroad, and the franchise, property, rights and privileges of the corporation, by paying it therefor such sum as will reimburse the amount of capital paid in, with a net profit thereon of ten per cent per annum from the time of the payment thereof by the stockholders to the time of such purchase.

* * *

SEC. 3748. Nothing in this title shall affect rights or liabilities accrued previous to December first, A. D. 1850.

SEC. 3749. The provisions of this title shall at all times be subject to alteration, amendment or repeal by the general assembly.

.

SEC. 3810. A railroad corporation may lay out its road, not exceeding five rods wide, and may purchase or otherwise take lands or materials necessary for making or securing its railroad, and such water and in such quantity as is required for the uses of the road, with the right of entering upon the land and constructing and keeping in repair necessary aqueducts.

.

SEC. 3814. When a railroad corporation has not acquired, by gift or purchase, land, real estate or property, taken or required for the construction, maintenance and convenient accommodation of its road, and if the parties do not agree as to the price of such lands and other property, any two judges of the supreme court, upon application for that purpose by the corporation, shall appoint three disinterested commissioners, one of whom shall be an inhabitant of the town and all shall be inhabitants of the county in which the land or other property to be appraised is situated, to determine the damages which the owners of such lands or property have sustained by the occupation of the same for the purposes aforesaid.

.

SEC. 3819. Upon the payment of the damages determined upon by the commissioners, with the costs and charges thereupon accruing, by the company, or upon the deposit of the same by the company in such bank, or with such clerk of the supreme court as the commissioners direct, to the credit of the person to whom the damages have been awarded, such bank or clerk giving notice personally, or by mail, to such persons that such deposit has been made, the company shall be deemed to be seized and possessed of the land or other property appraised by the commissioners.

APPENDIX B

1898 Vt. Acts No. 160

No. 160.—AN ACT TO INCORPORATE THE RUTLAND-CANADIAN RAILROAD COMPANY

.

*It is hereby enacted by the General Assembly of the
State of Vermont:*

SECTION 1. Wallace C. Clement, H. G. Smith, Frank R. Wells, Frederick W. Wilder, W. W. Stickney, George R. Bottum, John W. Stewart, W. Seward Webb, and Percival W. Clement, and such other persons as may be associated with them, and their successors and assigns, are hereby constituted and created a body politic and corporate by the name of the "Rutland-Canadian Railroad Company," for the purpose and with the right of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property by the power of steam or otherwise, from some point in the city of Burlington, in the county of Chittenden, on or near the railroad of the Rutland Railroad Company, to some convenient points on the Canada line and the New York line in the town of Alburgh in the county of Grand Isle. Said railroad may extend from such point in said city of Burlington through the city of Burlington and the towns of South Burlington, Colchester and Milton, in said county of Chittenden, or through so many of said towns as shall be most advantageous to some point on the shore of Lake Champlain, thence across Lake Champlain to some convenient point in the town of South Hero, thence through the towns of South Hero and North Hero to some convenient point in the town of Alburgh, all in said county of Grand Isle, thence in two branches to some convenient point on the Canada line, and some convenient point on the New York line, or over so much of said route as is most convenient, with the right to cross Lake Champlain at convenient points between said

towns of Colchester or Milton and South Hero, South Hero and North Hero, North Hero and Alburgh, and Alburgh and the state of New York. Or said corporation may, in its discretion, instead of following the route above described, construct its railroad from such point in the city of Burlington through any towns or cities in the counties of Chittenden, Franklin, and Grand Isle to a convenient point on the Canada line with a branch to a convenient point on the New York line and may cross Lake Champlain at any place or places on the route adopted. Said corporation shall have and enjoy the right of eminent domain and shall have full power to connect with, sell or lease to, or consolidate with, or to acquire by purchase or lease, and to operate any other railroad within or without this state, and may lay out, construct and maintain a railroad with a single or double track on the route designated by its location as hereinafter provided; may build, erect and maintain suitable and convenient branches, buildings, stations, fixtures, machinery, sidetracks and terminal facilities, and other appurtenances, for the accommodation of the passengers, freight and business of said railroad; may receive, take, hold, purchase, use and convey such real and personal estate as is necessary or proper in the judgment of such corporation, for the construction, maintenance and accommodation of such railroad as aforesaid, and its structures and appurtenances, and as the purposes of the corporation may require; and by its corporate name shall have perpetual succession, may sue and be sued, plead and be impleaded, and appear, defend and prosecute to final judgment in any court; may have a common seal and alter the same at pleasure, and as such corporation, shall have the powers, rights, privileges and franchises incident to railroad companies and other corporations.

. . . .

SEC. 5. The directors may cause examinations and surveys for the line of said road to be made, the expense

of which shall be paid by said corporation, and after such examinations and surveys are made, may locate said road not exceeding five rods in width, except at those points where greater width is necessary for the purpose of construction, stations, yards, side-tracks, terminal facilities or otherwise, at which points said location may be of convenient width for the accommodation thereof, and shall by certificate under the hand of a majority of said directors, and the seal of the corporation, define the course, distance or boundaries of the same in each town through which it passes, and below low water mark in Lake Champlain, and shall cause the same to be recorded in the respective clerks' offices of said towns; and that part of the location covering that portion of Lake Champlain below water mark shall be recorded in the office of the secretary of state. The directors may from time to time make such alterations in the location of said road as they may deem expedient, causing the same to be recorded as above specified. The corporation hereby created may also construct branches to quarries, mills, or other business concerns on or off the line of its road as its interests may require, and said corporation shall have all privileges and rights given by the general law to railroad companies or corporations, for acquiring title and possession to property covered by its location, and to all its branches and appurtenances; also to lands and materials necessary for making or securing its railroad, and such water as is required for the use of said road; and shall have such rights in crossing private highways, public highways, turnpikes, streams and bridges as are given to said companies or corporations; and shall have the right to construct over the waters of Lake Champion, on the line of its location, suitable bridges for the accommodations of its road, and shall provide the same with draws suitable for navigation.

. . . .

SEC. 9. The corporation hereby created shall enjoy all powers, rights, privileges, and franchises, conferred upon or vested in railroad companies or corporations, and other corporations, by the general laws of this state, so far as the same are applicable and not inconsistent with the special provisions of this act. All acts, and parts of acts, general or special, inconsistent with the provisions of this act shall not be held applicable to the corporation hereby created.

SEC. 10. This act shall take effect from its passage, and shall be deemed and taken to be a public act, and shall be construed favorably and beneficially for all purposes for which the same is intended, and shall, at all times be under the control of the legislature to amend or repeal as the public good may require.

Approved November 4, 1898.

APPENDIX C
COMMISSIONERS' AWARD
TO
WILLIAM H. H. BARKER ESTATE
FROM
RUTLAND-CANADIAN RAILROAD COMPANY

Whereas, the Rutland-Canadian Railroad Company a corporation created by and existing under the laws of the State of Vermont and having its principal office at Rutland, in the County of Rutland and State of Vermont, for the purposes of its railroad has located, entered upon and occupied lands owned by Charles C. Barker, administrator of the Estate of William H. H. Barker, late of Burlington, and William P. Barker, of Jersey Shore in the County of Lycoming and State of Pennsylvania, Caro F. Kingsley, of Boise City in the County of Ada and State of Idaho, Charles C. Barker, S. Annie Barker and Harry Ashel Barker, all of Burlington in the County of Chittenden and State of Vermont and situated in the City of Burlington in the County of Chittenden and State of Vermont, and described as follows, to wit:

Beginning at station 117+07 of the center line of location of said grantee, on the southeasterly boundary line of the premises hereby conveyed and on the boundary between said premises and land of the Vermont Episcopal Institute; thence N. 47 degrees 45 minutes E. along said boundary 66.24 ft.; thence N. 48 degrees 38 minutes W. 635.7 ft. to land of Frederic M. Manwell; thence S. 47 degrees 45 minutes W. on the boundary line between the premises hereby conveyed and land of said Manwell and crossing said center line of location at station 123+41, 149 ft.; thence S. 48 degrees 38 minutes E. 631.9 ft. more or less to said southerly boundary line;

thence N. 47 degrees 45 minutes E. 82.8 ft. to the place of beginning, and containing 2.16 acres more or less.

The above courses are referred to the true meridian.

And Whereas, the said owners of said land and the said Company have not agreed as to the amount of damages to be paid to said owners therefor by said Company; and application has been made by said Company to the Hon. Russell S. Taft and the Hon. John W. Rowell, two of the Judges of the Supreme Court of the State of Vermont, to appoint three disinterested commissioners to determine such damages, the said Judges have duly appointed the undersigned commissioners in that behalf according to the provisions of the Act incorporating said Company and the Statutes of the State of Vermont; and said Company on the 24th day of July 1899, and more than ten days prior to the date of hearing, as hereinafter set forth, has deposited in the clerk's office in the city of Burlington a plan and description in writing of the land or property so taken:

Now therefor, We, the said Commissioners, on the 21st day of July 1899, and more than twelve days prior to the time of meeting, did notify in writing as well the said owners of said land as the said Company that we would meet at the County Court House in said city of Burlington on the 4th day of August 1899 at 9 o'clock in the forenoon for the purpose of such determination. And now afterwards on the same 4th day of August, 1899, having met at the time and place and for the purposes in said written notice specified and having examined the premises and heard the parties in the matter, we did appraise and determine the damage to the said owners of said land occasioned by such location, entry and occupation by the said Company, as aforesaid, at the sum of four hundred and fifty dollars, to be paid by said Company to the said owners of said land or to be deposited to their credit in the Burlington Trust Company in the

city of Burlington and County of Chittenden, and thereafter, to wit, on the 14th day of August 1899, we notified the said owners of said land of this appraisal by delivering to them a copy hereof, all pursuant to the provisions of said Act and said Statutes aforesaid.

In Witness Whereof we hereunto set our hands at Burlington aforesaid, this 14th day of August, 1899, and deliver the same to said Company.

/s/ Torrey E. Wales)	
/s/ B. B. Smalley)	Commissioners.
/s/ William J. Van Patten)	

Received for record Sept. 2, 1899, at 2 o'clock P.M. and recorded.

Attest: Charles E. Allen

APPENDIX D

1900 Vt. Acts No. 153

No. 153.—AN ACT TO CONSOLIDATE THE
RUTLAND RAILROAD SYSTEM.

. . . .

It is hereby enacted by the General Assembly of the State of Vermont:

SECTION 1. The Rutland Railroad Company may merge and consolidate its capital stock, franchises and property with and may acquire the capital stock, franchises and property of any or all of the railroad or transportation companies hereinafter named, upon such terms and conditions as may be agreed upon by the Boards of Directors and ratified by a majority vote of the stock of each of the consolidating companies voting at any meeting duly called for that purpose, to wit:

The Bennington and Rutland Railway Company,

The Rutland-Canadian Railroad Company,

The Addison Railroad Company,

The Ogdensburg and Lake Champlain Railway Company,

The Rutland and Noyan Railway Company,

The Rutland Transit Company, and

Any railroad or transportation company within or without this State, except railroads or transportation companies running on parallel or competing lines connecting with, controlled by or which may form a through line with the railroads of any of the companies named.

. . . .

SEC. 4. Upon consummation of such act of consolidation, all the general and special rights, powers, privileges, immunities, exemptions, exceptions, capacities, benefits,

advantages, grants and franchises, and all of the property, both real, personal and mixed of such consolidating corporations and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them shall be taken and deemed to be transferred to and vested in said Rutland Railroad Company without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the Rutland Railroad Company as they were of the other corporations, parties to such agreements and act, and the title to all real estate taken by deed or otherwise under the laws of this state or any other state or country or of the United States vested in either of such corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act or anything done by virtue hereof; but shall be vested in said Rutland Railroad Company by virtue of such act of consolidation.

The said Rutland Railroad Company shall have and enjoy in the ownership and operation thereof, all general and special rights, powers, privileges, immunities, exemptions, exceptions, capacities, benefits, advantages, grants and franchises which were owned and enjoyed by its predecessor companies or corporations under their charters and by the corporations consolidating with it, and no further deed, conveyance or record shall be required for the purpose of effecting such merger, consolidation, transfer and conveyance.

. . . .

SEC. 10. This act shall be read and construed as an act in amendment of and in addition to an act entitled "An act to Incorporate the Rutland Railroad Company," approved March 28, 1867, and all acts heretofore passed in amendment thereof. All acts and parts of acts, gen-

eral or special, inconsistent with the provisions of this act shall not be held applicable to the Rutland Railroad Company.

This act shall take effect from its passage and shall be deemed and taken to be a public act and shall be construed favorably and beneficially for all purposes for which the same is intended.

Approved October 29, 1900.

APPENDIX E

1963 Vt. Acts No. 162

NO. 162. AN ACT RELATING TO THE RUTLAND RAILWAY CORPORATION

(H. 124)

It is hereby enacted by the General Assembly of the State of Vermont:

Section 1. *Policy*

It is hereby declared to be the policy of the State of Vermont to preserve for continued railroad service, so much of the line of the Rutland railway corporation as may be feasible in the event of abandonment of such service by the Rutland railway corporation.

Sec. 2. *Acquisition-necessity*

The public service board as agent for the state, with the approval of the governor, is authorized to acquire, by purchase or condemnation, after the certificate and order dated September 18, 1962 of the interstate commerce commission in finance docket #21870 re Rutland railway corporation abandonment of entire line shall take effect and be in force, such portion or portions of the line of the Rutland railway corporation located within the State of Vermont, including such tracks and ties, rights of way, land, buildings, appurtenances and other facilities necessary and required for the operation of railroad for the purpose of sale or lease thereof for continued operation of a railroad as may be desirable or necessary for such continued operation. The acquisition of such property is declared to be for a public purpose and to be reasonably necessary.

Sec. 3. *State not to operate*

The provision of this act shall not be construed to authorize or permit the state or any of its agencies,

including the public service board, to operate any property or facilities acquired as a railroad, or to make any other use thereof except as specifically authorized by this act, or to grant any subsidy for the operation of any part of said railroad.

Sec. 4. Sale or lease; purpose

The public service board as agent for the state, with the approval of the governor, is authorized to sell, transfer or lease all or any part of property acquired under the provisions of this act, to any responsible person, firm or corporation, for continued operation of a railroad, or other public purpose, provided, if necessary, approval for such continued operation, or other public purpose, is granted by the interstate commerce commission of the United States. Such sale, transfer or lease shall be for such price and subject to such further terms and conditions as, in the opinion of the public service board, are necessary and appropriate to effectuate the purposes of this act.

. . . .

Approved: June 21, 1963.

APPENDIX F

Vt. Stat. Ann. tit. 30, § 711 (1986)

§ 711. Railroad rights-of-way

Notwithstanding the provisions of section 213 of Title 1, when railroad operations cease on railroad rights-of-way owned by the state or municipality the title or interest held by the state or municipality in such rights-of-way shall be retained by the state or municipality for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes; except that such rights-of-way shall not be used by members of the general public without permission of the state or municipality. The state or municipality shall allow abutting farm operations to use the land over which the rights-of-way pass for agricultural purposes.—
Added 1981, No. 187 (Adj. Sess.), § 1.

APPENDIX G

1984 Vt. Acts (1983 Adj. Sess.) No. 207

NO. 207. AN ACT RELATING TO THE OPERATIONS
AND FUNDING OF THE ST. JOHNSBURY AND
LAMOILLE COUNTY RAILROAD

(H. 740)

It is hereby enacted by the General Assembly of the
State of Vermont:

* * * *

Sec. 5. DEPOSITS INTO FUND; AUTHORITY OF SECRETARY

* * * *

[F]unds received by the state from past, present and future service providers on state-owned railroad properties, together with funds received by the state because of licenses, leases, easements, sale of real or personal property, or the like, pertaining to or arising from the former Rutland Railroad Corporation property and the former St. Johnsbury and Lamoille County Railroad property and the former Montpelier & Barre property, and the former Delaware and Hudson property acquired by the state shall be deposited in the fund. The secretary shall have authority to enter into licenses, leases, and easements and sale of personal property in connection with said properties. The secretary shall have authority, with the approval of the board and the governor, to sell to any legal entity part or all of any of the several properties or rights therein, provided that the terms of the sales are approved by the legislature or, in the event that the general assembly is not in session, by the joint fiscal committee.

* * * *

Approved: April 26, 1984

APPENDIX H

LEASE AGREEMENT

BETWEEN

THE STATE OF VERMONT
AGENCY OF TRANSPORTATION

AND

THE CITY OF BURLINGTON

THIS LEASE AGREEMENT, entered into on this 18th day of June, 1985, by and between the State of Vermont, a sovereign state with its principal place of business in the City of Montpelier, County of Washington, and State of Vermont, acting through its Agency of Transportation, owner, hereinafter referred to as "LESSOR"; joined by the Vermont Railway, Inc., a Vermont corporation with its principal place of business at One Railway Lane, in the City of Burlington, County of Chittenden and State of Vermont, lessee of the hereinafter described parcel, hereinafter referred to as "RAILROAD"; and the City of Burlington a municipal corporation with its principal place of business at City Hall in the City of Burlington, County of Chittenden, and State of Vermont, hereinafter referred to as "LESSEE";

WHEREAS, the LESSOR is the owner of certain lands and premises in the City of Burlington, more particularly described below, which are part of the land and premises acquired by the LESSOR from the Rutland Railway Corporation by Quitclaim Deed, dated January 1, 1964, and recorded in Book 151 at Pages 566-576 of the land records of the City of Burlington, and

WHEREAS, the RAILROAD leases said land and premises from LESSOR by virtue of a certain indenture, dated January 6, 1964, and recorded in Book 163 at Pages 563-569 of the land records of the City of Burlington, as subsequently renewed and amended, and

WHEREAS, the LESSEE seeks to construct and maintain a bicycle and pedestrian path along that portion of the LESSOR'S lands and premises extending from chaining station 6488 + 65 (mile post 122.8911) thence northerly along the railroad centerline approximately 9,485 feet (1.796 miles) to chaining station 6583 + 50 (mile post 124.6875), and

WHEREAS, the RAILROAD already has removed its tracks from that portion of the LESSOR'S lands and premises extending from (approximately) chaining station 6512 + 44 (mile post 123.3416), near a point on the southern side of the North Beach overpass, so-called, to the northern boundary of the LESSOR's property at chaining station 6583 + 50 (mile post 124.6875) and does not presently require such portion of the LESSOR'S lands and premises for its operations, and

WHEREAS, the portion of the LESSOR'S lands and premises between chaining station 6488 + 65 (mile post 122.8911), where the LESSOR's property abuts lands now or formerly owned by the Central Vermont Railway, Inc., and (approximately) chaining station 6512 + 44 (mile post 123.3416) presently is being used by the RAILROAD for storage of rolling stock but will no longer be required for such purpose or for any other of the RAILROAD's present operations once the RAILROAD has completed construction of new tracks located adjacent to the RAILROAD'S main line south of Burlington, and

WHEREAS, the RAILROAD wishes to be relieved of the responsibility for maintaining the LESSOR'S lands and premises between chaining station 6488 + 65 (mile post 122.8911) and chaining station 6583 + 50 (mile post 124.6875) during the period of time that such portion of the LESSOR'S lands and premises is not immediately required for railroad operations, and

WHEREAS, the General Assembly of the State of Vermont, in Act No. 187 of the Laws of 1982 (now codi-

fied at Vermont Statutes Annotated, title 30, section 711) has provided that "when railroad operations cease on railroad rights-of-way owned by the state . . . the title or interest held by the state . . . shall be retained by the state . . . for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes . . .", and

WHEREAS, the LESSEE has requested that said lands and premises be leased to it for use as a portion of the aforementioned bicycle and pedestrian path, and

WHEREAS, the LESSOR and the RAILROAD are satisfied that the use proposed by the LESSEE is a proper use that is consistent with preservation of the said lands and premises for future railroad or other transportation purposes, and

WHEREAS, the LESSEE is ready, willing, and able to maintain said lands and premises, and the bridges, underpasses, overpasses, culverts, embankments, drainage ditches, stone fills, retaining walls, and fences, and other appurtenances thereto in a manner consistent with preservation of said lands and premises for future railroad or other transportation purposes, and

WHEREAS, the General Assembly of the State of Vermont, in Act No. 207 of the Laws of 1984 (1983 Adj. Sess.), has authorized the Secretary of Transportation, on behalf of the State of Vermont, to enter into leases in connection with the properties or rights acquired by the State of Vermont from the Rutland Railway Corporation.

NOW THEREFORE, the parties agree as follows:

For and in consideration of the rent hereinafter reserved, and the acceptance by the LESSEE of each and every covenant, term and condition herein set forth, the LESSOR does hereby lease unto the LESSEE two parcels of land in "as is" condition described as follows:

ARTICLE I—DESCRIPTION OF PREMISES

Parcel No. 1:

Being all of the LESSOR'S railroad land beginning approximately at chaining station 6512 + 44 (mile post 123.3416) (said point being located just south of the North Beach underpass, so-called, at the present northern most limit of the RAILROAD'S rails), thence northerly along the railroad centerline 7,106 feet (1.3458 miles) to chaining station 6583 + 50 (mile post 124.6875) (said point being the LESSOR'S northern property line). This parcel generally is 82.5 feet (5 rods) in width, except for a portion from chaining station 6540 + 79.1 (mile post 123.8786) thence northerly along the railroad centerline approximately 741.0 feet (.1403 miles) to chaining station 6548 + 20.1 (mile post 124.0185), in which portion the width is 148.5 feet (9 rods). Said "Parcel No. 1" is believed to contain about 14.5811 acres, more or less.

Parcel No. 2:

Being all of the LESSOR'S railroad land, beginning at chaining station 6488 + 65 (mile post 122.8911), the point at which the LESSOR'S southern property line abuts that of lands now or formerly owned by the Central Vermont Railway, Inc., thence northerly along the railroad centerline approximately 2,379 feet (.4506 miles) to approximately chaining station 6512 + 44 (mile post 123.3416) (said point being located just south of the North Beach underpass, so-called, at the present northern most limit of the RAILROAD'S rails). This parcel generally is 82.5 feet (5 rods) in width. Said "Parcel No. 2" is believed to contain about 4.5056 acres, more or less.

The property herein leased is more particularly described in the following deeds and instruments, of record in the office of the City Clerk of the City of Burlington:

. . . .

5. Being all and the same land and premises described in Commissioners' Award to the William H. H. Barker Estate, *et al.*, from the Rutland-Canadian Railroad Company, dated August 14, 1899 and recorded in Book 46, Pages 205-206;

6. Being all and the same land and premises described in Warranty Deed from Frederick M. Manwell and Mary Manwell to the Rutland-Canadian Railroad Company, dated August 2, 1899 and recorded in Book 44, Page 322, subject, however, to clarification, as described in Quitclaim Deed from the Vermont Railway, Inc. and the State of Vermont to J. Paul Presault [sic] and Patricia A. Presault [sic], dated October 6, 1975 and recorded in Book 235, Pages 322-324;

. . . .

The property herein leased is subject to a number of utility and crossing agreements.

. . . .

ARTICLE V—MAINTENANCE

1. The LESSEE shall be responsible to perform, at its own expense, all required maintenance of the leased lands and premises and will keep each and every part of the said premises in a safe, clean and desirable condition at all times during the term of this Lease Agreement.

2. The LESSEE shall be responsible for refuse and snow removal on the leased lands and premises.

3. The LESSEE shall take all measures reasonably required by the LESSOR or the RAILROAD to prevent soil, debris, or any other obstructions from entering on or near the track, drainage ditches to culverts, or other areas where railroad operations are being conducted.

4. The LESSEE shall be responsible for maintaining all bridges, culverts, overpasses, underpasses, embankments, drainage ditches, stone fills, retaining walls, and fences heretofore maintained or liable to be maintained by the LESSOR and/or the RAILROAD.

. . . .

ARTICLE VI—CONSTRUCTION

3. The LESSOR and the RAILROAD hereby expressly approve the LESSEE'S paving, for use as a bicycle and pedestrian path, that portion of the leased lands and premises now or formerly occupied by the RAILROAD'S tracks. The LESSEE shall furnish the LESSOR with a description of the work and a copy of the plans pertaining thereto.

4. The LESSEE shall not raise or lower the existing railroad grade more than one (1) foot without the prior written approval of the LESSOR and the RAILROAD.

. . . .

ARTICLE VIII—INDEMNITY AND PUBLIC LIABILITY AGREEMENT

1. The LESSEE agrees to indemnify, defend and save the LESSOR and the RAILROAD and its authorized agents, officers, representatives and employees harmless from and against any and all actions, penalties, liabilities, claims, demands, damages or losses resulting from any civil or criminal court actions, arising directly or indirectly out of use of the leased lands and premises for a bicycle and pedestrian path or the acts or omissions of the LESSEE, its agents, employees, servants, guests (including bicyclists and pedestrians), or business visitors, tenants, sublessees, partners, or affiliates.

ARTICLE IX—TERMINATION

1. The LESSEE expressly acknowledges that it is aware that the RAILROAD is authorized by the Interstate Commerce Commission to lease and operate a line of railroad extending to a northernmost point at chaining station 6583 + 50 (mile post 124.6875), a point that also is the northern boundary of "Parcel No. 1" hereinabove described, and the LESSEE further expressly acknowledges that it is aware that it again may be necessary or desirable for the LESSOR or the RAILROAD to terminate this Lease Agreement and to relay railroad tracks and resume railroad operations over all or a portion of the lands and premises herein leased to the LESSEE.

2. This Lease Agreement, with all its provisions and covenants shall continue in force until the expiration of the period described in Article II, with the understanding, however, that the LESSOR or the RAILROAD may terminate the same at any time by giving at least six (6) months notice thereof in writing, and may thereafter take full and complete possession of the premises hereby leased, at the end of said six (6) month period, any State, Municipal or other Statute or Regulation to the contrary notwithstanding.

. . . .

5. It is understood and agreed by and between the parties hereto that neither the LESSOR nor the RAILROAD will exercise their right to terminate this Lease Agreement in order to relay track on the leased premises to be used only for storage of rolling stock rather than active railroad operations.

. . . .

ARTICLE X—MISCELLANEOUS

1. The LESSEE will take all measures reasonably required by the LESSOR, the RAILROAD or the

Central Vermont Railway, Inc. to prevent persons from entering on or near the track or other areas where railroad operations are being conducted.

2. The LESSOR and RAILROAD and their designees shall have the right of entry at any time during reasonable working hours for the purpose of inspection of the premises. Right of entry is also reserved to the RAILROAD and the Central Vermont Railway, Inc. for the purpose of track rehabilitation and maintenance adjacent to the leased premises as well as to the utilities who use or occupy portions of the leased lands and premises by permission of the LESSOR or its predecessors in interest.

• • • • •

11. The LESSEE shall be responsible for payment of any taxes or payments in lieu of taxes that may be assessed against the LESSOR or the RAILROAD during the period of this Lease Agreement on account of their title or interest in the lands and premises herein leased to the LESSOR.

• • • • •

[Signatures Omitted in Printing]

APPENDIX I

Vt. Stat. Ann. tit. 5, ch. 58 (Supp. 1988)

§ 3401. Declaration of policy

It is hereby declared to be the policy of the state of Vermont:

(1) to preserve and modernize for continued railroad service those railroad lines, both within the state of Vermont and extending into adjoining states, which directly affect the economy of the state or provide connections to other railroad lines which directly affect the economy of the state; and

(2) in those cases where continuation of railroad service is not economically feasible under present conditions, to preserve established railroad rights-of-way for future reactivation of railroad service, trail corridors and other public purposes not inconsistent with further reactivation of railroad service.—Added 1987, No. 211 (Adj. Sess.), § 1, eff. May 26, 1988.

§ 3402. Scope

For purposes of this chapter, the term "state-owned railroad property" includes the following:

(1) property of the former Rutland Railway Corporation south of chaining station 6583+50 (milepost 124.6875) in Burlington acquired pursuant to No. 162 of the Public Acts of 1963;

(2) property of the former St. Johnsbury and Lamoille County Railroad acquired pursuant to No. 182 of the Public Acts of 1974 (1973 Adjourned Session);

(3) property of the former Montpelier and Barre Railroad Corporation acquired pursuant to No. 188 of the Public Acts of 1980 (1979 Adjourned Session);

(4) property of the Delaware and Hudson Railway Company's Washington Branch acquired pursuant to No.

216 of the Public Acts of 1982 (1981 Adjourned Session) and No. 221, section 17(i) of the Public Acts of 1986 (1985 Adjourned Session); and

(5) other railroad property acquired by the agency of transportation or its predecessors pursuant to this chapter or other enabling legislation.—Added 1987, No. 211 (Adj. Sess.), § 1, eff. May 26, 1988.

. . . .

§ 3406. Sale or lease of state-owned railroad property for other purposes

(a) In connection with state-owned railroad property, the secretary shall have authority to enter into licenses, leases, easements and sales of personal property, including tracks, structures and buildings which are to be removed by the purchaser.

. . . .

§ 3408. Railbanking

(a) If the secretary finds that the continued operation of any state-owned railroad property is not economically under present conditions, he or she may place the line in railbanked status. The agency, on behalf of the state, shall continue to hold the right-of-way of a railbanked line for reactivation of railroad service or for other public purposes not inconsistent with future reactivation of railroad service. Such railbanking shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of the rights-of-way for railroad purposes.

(b) The secretary may enter into agreements with units of federal, state and local governments, as well as with responsible private persons, for interim use of the right-of-way of a railbanked line, provided that the interim use is not inconsistent with future reactivation of railroad service.—Added 1987, No. 211 (Adj. Sess.), § 1, eff. May 26, 1988.

APPENDIX J

Vt. Stat. Ann. tit. 19, §§ 301(8), 702, 775 (1987)

§ 301. Definitions

As used in this chapter:

. . . .

(8) "Trail" means a public right-of-way which is not a highway and which:

(A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or

(B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties.

. . . .

§ 702. Width of highways and trails

The right-of-way for each highway and trail shall be three rods wide unless otherwise properly recorded. Any highway which had been designated as a trail prior to July 1, 1967 and later becomes a trail shall retain the same width of right-of-way as a trail as it had as a highway, but not exceeding three rods.

. . . .

§ 775. Title to discontinued highway

The selectmen shall notify the commissioner of forests, parks and recreation when they have filed a petition to discontinue a highway under this subchapter. The selectmen may designate the proposed discontinued highway as a trail, in which case the right-of-way shall be continued at the same width. The commissioner of forests, parks and recreation with the approval of selectmen, may also make this designation. If the discontinued highway is

not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side.

OPPOSITION BRIEF

(5)
No. 88-1076

Supreme Court, U.S.
FILED
MAR 22 1989

WILLIAM S. BRANIGAN, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

**J. PAUL PRESEAUT AND PATRICIA PRESEAUT,
PETITIONERS**

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

Petitioners claim to own a reversionary interest in a portion of a right-of-way used by the Vermont Railway, Inc. The question is whether an order of the Interstate Commerce Commission that allows the City of Burlington to use that right-of-way as a nature trail is invalid as an unconstitutional taking of petitioners' property even though petitioners may seek just compensation under the Tucker Act.

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In the Supreme Court of the United States

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J. PAUL PRESEALT AND PATRICIA PRESEALT,
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v.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 853 F.2d 145. The final order of the Interstate Commerce Commission (Pet. App. 47-54) is reported at 2 I.C.C.2d 903 (1987).

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1988. A petition for rehearing was denied on September 28, 1988. (Pet. App. 57.) The petition for a writ of certiorari was filed on December 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1968, Congress enacted the National Trails System Act (16 U.S.C. 1241 *et seq.*) (Trails Act) to

(1)

establish a nationwide system of nature trails. As originally enacted, the Trails Act did not provide for the conversion of railroad rights-of-way to nature trails. Congress first addressed that possibility in Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 10906. Section 809 provided for: (1) studies aimed at preserving railroad rights-of-ways, and (2) measures encouraging the voluntary conversion of railroad lines to nature trails. 49 U.S.C. 10906 note.

In 1983, Congress amended the Trails Act by adding Section 8(d) (codified at 16 U.S.C. 1247(d) (Supp. IV, 1986)). Section 8(d) was enacted "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d). See also H.R. Rep. No. 28, 98th Cong., 1st Sess. 8 (1983) ("previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes"). To accomplish that goal, Section 8(d) modified the authority of the Interstate Commerce Commission (ICC or Commission) over the abandonment of rail lines.

In general, the Commission has plenary authority over whether a railroad may abandon one of its lines. See 49 U.S.C. 10903 (1982 & Supp. IV 1986); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). That power was modified by Section 8(d) of the Trails Act to provide that rights-of-ways that otherwise might be abandoned may be preserved and used on an interim basis as nature trails under the supervision and maintenance of a public agency or private party. Section 8(d) states that, if the railroad and trail user reach such an arrangement, "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of

the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d) (Supp. IV 1986). In short, Section 8(d) allows for the maintenance of railroad rights-of-way for possible future railroad use (so-called "railbanking"), while allowing such rights-of-way to be used currently as nature trails. See Pet. App. 3.

2. Petitioners are Vermont landowners who claim to hold a reversionary interest in a railroad right-of-way adjacent to their land (Pet. App. 3). Until 1975, Vermont Railroad, Inc., operated rail service over that line under a lease from the State of Vermont. The State of Vermont claims that it owns the right-of-way in fee simple (*id.* at 10). Petitioners, however, contend that they own title to the land, subject only to an easement for railroad purposes (*ibid.*). Accordingly, after active rail service had ceased, petitioners brought a quiet-title action in state court (*id.* at 3). The Supreme Court of Vermont dismissed that action on the ground that the ICC had exclusive jurisdiction over the right-of-way because it had not authorized the abandonment of the line. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985).

Petitioners then filed with the ICC a petition seeking a certificate of abandonment for the railroad line (Pet. App. 4). While that petition was pending, the State of Vermont informed the Commission that it had entered into a lease with the City of Burlington pursuant to Section 8(d) of the Trails Act whereby the City would maintain the right-of-way as a trail while preserving it for possible future rail use. See 51 Fed. Reg. 454 (1986). The Commission then dismissed petitioners' request for a certificate of abandonment (Pet. App. 5). The Commission later denied petitioners' request for reconsideration. The ICC explained that the lease arrangement between Vermont and Burlington satisfied the Trails Act (*id.* at 50). The Commission

observed that "interim trail use" might "conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act" (*id.* at 53).

3. Petitioners sought judicial review of the Commission's order in the court of appeals. The court sustained the Commission's order (Pet. App. 1-13). The court of appeals first rejected petitioners' claim that Section 8(d) of the Trails Act exceeds Congress's power to make laws regulating interstate commerce. The court stated: "The challenged section of the Trails Act serves two purposes: (1) preserving rail corridors for future railroad use and (2) permitting public recreational use of trails. Both purposes are legitimate congressional goals under the commerce clause." (Pet. App. 9). The court then observed that Section 8(d) is a "remarkably efficient and sensible way to achieve both goals" (Pet. App. 10).

The court of appeals then rejected (Pet. App. 10-13) petitioners' assertion that Section 8(d) is unconstitutional on its face because it effects a taking of private property without just compensation. The court noted that petitioners purport to hold a reversionary interest in the right-of-way (Pet. App. 12). The court ruled, however, that "[t]he ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest" (*ibid.*). Here, the court observed, the ICC has ruled that the right-of-way may not be abandoned because it should be retained for possible "future railroad use" (*ibid.*). The court held that the ICC's ruling, which followed from Section 8(d) of the Trails Act, did not effect a taking any more than a Commission order requiring a railroad to continue to provide railroad service over a particular line (*ibid.*).

ARGUMENT

1. Petitioners renew their claim (Pet. 8-17) that the Commission's application of Section 8(d) to the facts of this case resulted in an unconstitutional taking of petitioners' property. That claim is without merit.

a. This is an action brought under 28 U.S.C. 2342 for judicial review of a final order of the ICC. The court of appeals had jurisdiction only to decide the validity of the ICC's order denying petitioners' request for a certificate of abandonment. Petitioners do not contend that the Commission violated any statutory duty. Rather, they contend that the Commission's order results in an unconstitutional taking. But the Commission's order is constitutionally valid whether or not Section 8(d) effects a taking in this case. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

In *Williamson Planning Comm'n*, 473 U.S. at 194-195, this Court stated: "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking" (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, n.21 (1984)). The Tucker Act, 28 U.S.C. 1491, provides such a remedy. It allows a person to seek just compensation in the Claims Court for a taking of private property by the federal government.¹ See *United States v. Causby*, 328 U.S. 256, 267 (1946). Accordingly, this Court has "held that taking claims against the Federal Government are premature until the property owner has availed itself

¹ The federal district courts have jurisdiction over such claims not exceeding \$10,000. 28 U.S.C. 1346.

of the process provided by the Tucker Act." *Williamson Planning Comm'n*, 473 U.S. at 195. Petitioners have not pursued their claim under the Tucker Act. Thus, the Commission's application of Section 8(d) of the Trails Act in this case has not effected an unconstitutional taking even if petitioner's reversionary interest was "taken" within the meaning of the Fifth Amendment.

Contrary to petitioners' contention (Pet. 16), the Trails Act does not repeal the Tucker Act's grant of jurisdiction to adjudicate takings claims involving Section 8(d) of the Trails Act. In *Monsanto, supra*, this Court noted that the Tucker Act applies to taking claims under the Fifth Amendment unless Congress expresses its "unambiguous intention to withdraw the Tucker Act remedy." 467 U.S. at 1019. There is no such expression in the Trails Act. Petitioners cite a 1983 amendment to the Trails Act, which stated that the authority "to make payments[] under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts" (National Trail Systems Act Amendments of 1983, Pub. L. No. 98-11, § 101, 97 Stat. 42). But that provision, by its plain terms, does not affect payments made under the Tucker Act; it applies to payments made under the Trails Act. In any event, payments under the Tucker Act are made out of the Judgment Fund, which is an appropriated fund. See 31 U.S.C. 1304(a). Accordingly, petitioners may pursue their claim against the United States for compensation in the Claims Court. The Commission's order, therefore, is not invalid as an unconstitutional taking of private property without just compensation.

b. The court of appeals rested its judgment on a different ground. It reasoned that petitioners' property had not been "taken" within the meaning of the Fifth Amendment. The court of appeals noted that the ICC has plenary

authority to determine whether a railroad line may be abandoned and, until the Commission authorizes an abandonment, "no reversionary interest can * * * vest." Pet. App. 12. That reasoning appears to be at odds with the court of appeals' decision in *National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988). In that case, the District of Columbia Circuit reviewed the Commission's regulations implementing Section 8(d) of the Trails Act. The court ruled that Section 8(d) could, in a given case, effect a taking of private property. 850 F.2d at 706. The court noted that whether a taking occurs will depend on the landowners' property interest under state law (*ibid.*) and the likelihood that the right-of-way will be used for rail services in the future (*id.* at 707-708). The court remanded the regulations to the Commission for reconsideration in light of the court's Fifth Amendment analysis.² Accordingly, the Second Circuit seems to hold that Section 8(d), if properly applied, can never result in a taking of property, whereas the District of Columbia Circuit holds that it might in a particular case.

For two reasons, however, we believe that this case is not the proper vehicle for resolving that disagreement. First, as we explained above, this action is one for judicial review of an order of the Commission. That order is valid whether or not Section 8(d) effects a taking in this case. Thus, the takings question raised in the petition is not squarely presented in this case.

Second, petitioners make a facial challenge to the statute. But this Court has repeatedly stated that, when

² On remand, the Commission readopted its rules. *Rail Abandonments—Use of Rights-of-Ways As Trails*, Ex parte No. 274 (Sub. No. 13) (Feb. 10, 1989), appeal pending, No. 89-1178 (D.C. Cir.). The ICC reasoned that the Claims Court is the proper forum to decide any questions of just compensation under the Fifth Amendment.

a plaintiff asserts a takings claim, "‘ad hoc, factual inquiries’ must be conducted with respect to specific property." *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987). Accord *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In this case, for example, a court could not resolve petitioners’ Fifth Amendment claim without initially resolving the issue whether petitioners own their land subject to a railroad easement or the State of Vermont owns the right-of-way in fee simple. The Claims Court is the proper forum for determining the facts necessary to resolve such fact-specific issues that are implicated by petitioners’ Fifth Amendment claim.

2. Petitioners next contend (Pet. 17-22) that Section 8(d) of the Trails Act exceeds the reach of Congress’s lawmaking power under the Commerce Clause. That argument has been rejected by every court that has considered it. See Pet. App. 9-10; *National Wildlife Fed’n v. United States*, 850 F.2d 705-707; *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 685 F. Supp. 1108, 1117-1119 (E.D. Mo. 1988). It is well settled that "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 277 (1981). Here, Congress found that the use and maintenance of railroad rights-of-way affect interstate commerce. See 16 U.S.C. 1247(d) (Supp. IV 1986). Petitioners do not contend that Congress’s finding is irrational. See generally *Hayfield Northern R.R. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 628-630 (1984) (Congress has well-recognized authority to regulate abandonment of railroad lines).

Instead, petitioners erroneously cite *Nollan v. California Coastal Comm’n*, 107 S.Ct. 3141 (1987), for the proposition that this Court has limited Congress’s power

under the Commerce Clause. In *Nollan*, the Court considered whether a state regulation effected a taking of private property. The Court did not consider Congress’s power to make laws under the Commerce Clause of the Constitution. The two inquiries are distinct. Indeed, this Court noted in *Kaiser Aetna v. United States*, *supra*, that the issue whether a law validly enacted under the Commerce Clause amounts to a taking "is an entirely separate question." 444 U.S. at 174. And under this Court’s holdings, there is no doubt that Congress had the power under the Commerce Clause to enact Section 8(d) of the Trails Act. The separate question—whether the application of Section 8(d) results in a taking in this case—is a matter for determination by the Claims Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MOTION

No. 88-1076

Supreme Court, U.S.

FILED

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CLERK

In The
Supreme Court of the United States
October Term, 1988

J. PAUL PRESEAULT and PATRICIA PRESEAULT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
STATE OF VERMONT,
CITY OF BURLINGTON, and
VERMONT RAILWAY, INC.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT OF
PETITIONERS, J. PAUL PRESEAULT AND
PATRICIA PRESEAULT

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No. 88-1076

In The

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J. PAUL PRESEALT and PATRICIA PRESEALT,

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v.

INTERSTATE COMMERCE COMMISSION,
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STATE OF VERMONT,
CITY OF BURLINGTON, and
VERMONT RAILWAY, INC.,

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On Petition for Writ of Certiorari to the
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MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS,
J. PAUL PRESEALT AND PATRICIA PRESEALT

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for petitioners and counsel for respondents Interstate Commerce Commission and the United States; this

consent has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondents State of Vermont, City of Burlington, and Vermont Railway, Inc.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth Amendment to the United States Constitution.

The opinion below holds that a federal statute which defeats a property interest as recognized under state law does not effect a compensable taking. Amicus believes the ruling below is incorrect and poses a serious threat to the integrity of private property rights. Although federal law may clearly preempt state law with regard to the exercise of property rights, such preemption does not answer the entirely separate question of whether the defeat of otherwise vested property interests constitutes a

taking by the federal government for which compensation must be paid. The public interest strongly supports enforcement of the constitutional limitation on federal power presented by the Takings Clause of the Fifth Amendment.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: January 25, 1989.

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SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation.

STATEMENT OF THE CASE

This case involves railroad rights-of-way. Initially, it must be stressed that not all railroad rights-of-way are the same. Sometimes a railroad acquires a right-of-way in fee simple absolute and the railroad's use of the property is not restricted by the terms of the original conveyance. See generally *National Wildlife Federation v. Interstate Commerce Commission, consolidated with Beres v. Interstate Commerce Commission*, 850 F.2d 694, 703 (D.C. Cir. 1988). "Other rights-of-way are specifically limited to railroad use and may revert to the original owner (or a successor in interest) if railroad use is discontinued." *Id.* Of these more limited rights-of-way, the two most common types are the fee simple determinable and the easement. *Id.*

The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance. As pointed out in *National Wildlife*, "the interest retained by a property owner whose land is subject to a railroad right-of-way will depend upon the language of the instrument conveying, or of the state law creating, that right-of-way and on the applicable state law rules of construction." *Id.* This is consistent with the basic axiom that property interests are created and defined by state law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

In cases where the right-of-way conveyed is an easement, state law will also determine the circumstances that trigger the reversion of the right-of-way. *National Wildlife*, 850 F.2d at 703. For example, in *Lawson v. State of Washington*, 107 Wash. 2d 444, 730 P.2d 1308, 1311-12 (1986), the Washington Supreme Court stated:

"[U]nder Washington law, when an easement is granted to a railroad through a private conveyance, the easement is not a 'perpetual public easement.' Instead, the particular deeds conveying the right-of-way must be interpreted to determine the scope and duration of the easement granted.

"At common law, where a deed is construed to convey a right-of-way for railroad purposes only, upon abandonment by the railroad of the right-of-way the land over which the right-of-way passes reverts to the reversionary interest holder free of the easement. In addition to outright abandonment of a right-of-way, there may be a change in use of the right-of-way which is inconsistent with the purpose for which the right-of-way was granted. Where the particular use of an easement for the purpose for which it was established ceases, the land is discharged of the burden of the easement and right to possession reverts to the original land owner or to that landowner's successor in interest." *Id.* (citations omitted).

Other state courts have similarly developed state law with regard to the circumstances triggering reversion of a railroad easement back to the original grantor or successor in interest. See *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 428 N.E.2d 671, 675-78 (1981); *Pollnow v. State of Wisconsin Department of Natural Resources*, 88 Wis. 2d 350, 276 N.W.2d 738 (1979). Similarly, the Vermont state law applicable to the right-of-way in this action recognizes the reversionary interest of the original grantor. See Petition for Writ of Certiorari (Pet.) at 10-11 n.2.

In the present action Paul and Patricia Preseault (petitioners) are Vermont landowners who claim to hold a reversionary interest in a railroad right-of-way adjacent to their land. *Preseault v. Interstate Commerce Commission*, 853 F.2d 145, 147 (2d Cir. 1988). They claim that under

Vermont law, they hold title to the underlying land subject to an easement right-of-way which is specifically limited to railroad use and that when railroad use is abandoned, unencumbered title reverts to them. *Id.* at 150; *see also* Pet. at 10 and n.2. According to petitioners such title reverted in 1975 when Vermont Railway removed portions of the track and discontinued rail service over the route. *Id.* at 147; Appendix to the Petition for Writ of Certiorari (App.) at 50 n.3.

Preseault, along with other property owners, filed a petition to the Interstate Commerce Commission (ICC) seeking a certificate of abandonment of the discontinued rail line. *Preseault*, 853 F.2d at 147. While the petition was pending, the State of Vermont and Vermont Railway, Inc.,¹ filed a notice with ICC seeking a "class exemption" to allow for the abandonment or discontinuance of the out of service line pursuant to 49 C.F.R. § 1152.50 (1987). *Preseault*, 853 F.2d at 147-48. The class exemption notice procedure allows carriers that have not moved local traffic on the line for at least two years to abandon or discontinue the line without going through the formal abandonment application process. At the same time, ICC was also informed of Vermont's intention to enter into an agreement with the City of Burlington for use of the right-of-way as a walking and bike trail. *Id.* at 148; App. at 48.

ICC granted the exemption thereby allowing the railway to discontinue service over the route. In addition,

¹ The railroad right-of-way is owned by the State of Vermont which then leased the right-of-way to Vermont Railway, Inc. *Preseault*, 853 F.2d at 147.

the interim trail use agreement between Vermont and the City of Burlington was approved pursuant to 16 U.S.C. § 1247(d). *Preseault*, 853 F.2d at 148.

Section 1247(d) authorizes the conversion of railroad rights-of-way to interim trail use. Although rail service is discontinued and the route is effectively abandoned for rail purposes, Section 1247(d) specifies that "such interim [trail] use shall not be treated for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). One of the stated objectives for allowing conversion of "rails to trails" is to preserve the right-of-way for potential future rail use. *Id.* However, there is little doubt that the reason the section specifies that interim trail use does not constitute abandonment for rail purposes is to prevent the vesting of reversionary interests in rights-of-way that would otherwise vest under state law when rail service is discontinued. The House Report accompanying the 1983 amendments to the Trails Act which codified Section 1247(d) states:

"The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." H.R. Rep. No. 98-28, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S. Code Cong. & Admin. News 112, 119-20.

The Ninth Circuit has recognized that this House Report "indicates that § 1247(d) was enacted primarily to prevent rights-of-way from reverting to their owners upon the cessation of railroad use." *Washington State Department of Game v. Interstate Commerce Commission*, 829 F.2d 877, 881 (9th Cir. 1987). Even ICC admitted in its decision upholding the approval of the interim trail agreement that "[i]nvariably, interim trail use will conflict with the reversionary rights of adjacent landowners, but that is the very purpose of the Trails Act." App. at 53.

While the congressional purpose of Section 1247(d) is to preserve railroad rights-of-way for public use by defeating the reversionary interests of adjacent property owners, Preseault contends that the effect of achieving this purpose is to take reversionary property rights without payment of just compensation in violation of the Fifth Amendment. *Preseault*, 853 F.2d at 147. Since Congress has clearly decided through enactment of Section 1247(d) that preventing the vesting of reversionary interests in railroad rights-of-way is an important public purpose, the posture of Preseault's claim is analogous to the takings claim advanced in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

"In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access . . . if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question." *Id.* at 174.

In the decision below, the Second Circuit paid scant attention to this "entirely separate question." Preseault contends that the postponement of otherwise vested

reversionary interests by ICC's continued exercise of jurisdiction works a taking for which compensation must be paid. *Preseault*, 853 F.2d at 150. This argument prevailed in an earlier case decided by the Court of Appeals for the D.C. Circuit. In *National Wildlife* the D.C. Circuit found that the indefinite postponement of a reversion that would otherwise vest under state law may constitute a taking, particularly when restoration of rail service in the future is not foreseeable. *National Wildlife*, 850 F.2d at 702-08. However, in the opinion below the Second Circuit ignores the careful analysis of *National Wildlife* and concludes that Section 1247(d) does not postpone any reversionary interest that may exist. The court rationalizes that because Section 1247(d) authorizes interim trail use, which is a proper exercise of ICC authority, there is no "abandonment" and hence the reversionary interest is never triggered. *Preseault*, 853 F.2d at 151. The Second Circuit stated:

"Petitioners claim that § 1247(d), by permitting the ICC to issue a Certificate of Interim Trail Use to a carrier that has discontinued service and not to issue a Certificate of Abandonment, enables the ICC to 'take' their property by indefinitely postponing the reversion of an interest that would otherwise vest under state law. See *Lawson v. State of Washington*, 107 Wash.2d 444, 730 P.2d 1308, 1315-16 (1986); see also *National Wildlife Federation*, at 702. We disagree. The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus petitioners' reversionary interest, if any, is not postponed any more by the operation of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction." *Id.*

In the present case, the petitioners' property right under state law to regain control over the right-of-way is being defeated by operation of federal law. Although federal law may so preempt state law, the effect of that preemption is to redefine and change existing property rights. The issue presented for this Court's resolution is whether such federal redefinition of state law created property rights constitute a taking without compensation in violation of the command of the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

I THE DECISION BELOW CREATES AN EXPRESS CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL

In *National Wildlife* the Court of Appeal for the D.C. Circuit reviewed ICC's rules implementing Section 1247(d). *National Wildlife*, 850 F.2d at 696. The court found that this section enabled ICC to take property without compensation by indefinitely postponing reversionary interests that would otherwise vest under state law. *Id.* at 702-08. The court ordered a remand so that the commission could reconsider its rules in light of the possible takings effect upon reversionary owners. *Id.* at 708.

The decision below is in direct conflict with *National Wildlife*. In *Preseault*, the Court of Appeals for the Second Circuit expressly recognized its sister court's decision in *National Wildlife* but rejected its conclusion outright by

succinctly stating: "We disagree." *Preseault*, 853 F.2d at 151.

The direct and irreconcilable conflict between these decisions is apparent. In *Preseault* the Second Circuit found that there is no taking because Section 1247(d) prevents the reversionary interests from vesting. *Preseault*, 853 F.2d at 151. *Preseault* was disinterested in the nature of the reversionary interest under state law, finding instead that as a matter of law no taking of reversionary interests could occur. *Id.* In contrast, the *National Wildlife* decision found that the operation of Section 1247(d) may postpone otherwise vested reversionary interests and that a taking may therefore occur. *National Wildlife*, 850 F.2d at 702-08. Consistent with this Court's takings jurisprudence, the *National Wildlife* court requires a case-by-case analysis which considers the effect of trail use on the specific reversionary rights as recognized under state law and whether future rail service is foreseeable. *Id.* at 706-08.

This direct conflict among the federal courts of appeals requires definitive resolution by the Supreme Court in order to allow for a proper and consistent implementation by ICC of Section 1247(d). On one hand ICC is given the green light by *Preseault* to exercise its regulatory authority without concern for whether the operation of Section 1247(d) may effect a taking. On the other hand, *National Wildlife* orders a remand to the agency to reconsider its implementing rules so that the takings effect of Section 1247(d) will be considered. *National Wildlife*, 850 F.2d at 708. Whichever direction ICC follows will be contrary to one of the Court of Appeals decisions.

The impact of the appellate court conflict is especially disturbing for property owners who may be subjected to Section 1247(d) conversions. Some property owners, such as petitioner Beres in the *National Wildlife* case, may be fortunate and have the rails to trails conversion be determined to constitute a taking for which compensation must be paid. But other property owners, advancing the exact same allegations, may be denied an opportunity to prove their case by courts following the *Preseault* decision. For property owners, the uncertainty of their reversionary rights is more than a legal question, it is an issue of immediate and real concern which directly affects property values and use.

Finally, the conflict among the courts places in limbo the whole "rails to trails" policy. While use of otherwise abandoned railroad rights-of-way for trails may be a good idea, until the takings issue is resolved the effective and lawful use of that policy is stymied.

II

THE DECISION BELOW IS CONTRARY TO THIS COURT'S TAKINGS JURISPRUDENCE

There is no doubt that the exercise of governmental authority which transfers to the public an easement or the right "to pass to and fro" across otherwise private property, constitutes a taking. *Nollan v. California Coastal Commission*, ___ U.S. ___, 97 L. Ed. 2d 677, 685-86 (1987). This Court has repeatedly reaffirmed that the right to exclude others is one of the "most essential sticks in the bundle of rights that are commonly characterized as

property." *Kaiser Aetna*, 444 U.S. at 176; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Nollan*, 97 L. Ed. 2d at 686. In the present case, to the extent ICC's continued exercise of jurisdiction conveys an easement to the public which did not previously exist, there is a taking for which compensation must be paid.

The petitioners have suffered no less of a taking merely because ICC is preventing them from reacquiring the property rather than appropriating the property directly. There is no practical difference between government actions that require a person to convey an easement to the public and government actions that prevent limited easements from being extinguished by cutting off the underlying landowner's right to unencumbered fee title. In either case, land that is otherwise not open to public access is required to be opened for such use by government action.

This Court's recent precedent further establishes that statutes or governmental actions which prevent the exercising of specific property rights work a taking of those rights. In *Hodel v. Irving*, 481 U.S. ___, 95 L. Ed. 2d 668 (1987), a federal statute which abrogated the right to pass property on to one's heirs was held to have worked a taking without compensation. *Id.* at 679. The taking was found even though "[a]ppellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it inter vivos." *Id.* Similarly, the present case involves a federal statute which prevents exercising of specific reversionary rights in property. The effect of denying those reversionary rights is to impose on the property holder an easement to pass to and fro

across property that would otherwise no longer be subject to a right-of-way easement. Under these circumstances, a taking should be found not only because a specific property interest is defeated, but also because the interference with the property impacts an essential stick in the bundle of rights.

In the decision below, the Second Circuit concludes that there is no taking or postponement of the reversionary interest because ICC did not issue a certificate of abandonment or relinquish jurisdiction over the right-of-way and therefore the reversionary interest could not vest. However, to characterize the reversionary interests as having not vested is misleading. But for Section 1247(d), the reversionary interest not only vests, it becomes presently possessory. As recognized by the Washington Supreme Court and the District of Columbia Circuit:

"The argument that the statutes are valid because they do not eliminate plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonments. Under the statutes, they would not." *National Wildlife*, 850 F.2d at 705 n.16 (quoting *Lawson v. State of Washington*, 107 Wash. 2d 444, 730 P.2d 1308, 1313 (1986)).

The error in the Second Circuit's rationale stems from its use of the term "abandonment." While it is clear that the right-of-way may not be abandoned for ICC purposes, and therefore ICC may continue to exercise jurisdiction over the right-of-way, this must not be confused with whether a change in use or abandonment has occurred under the terms of the original conveyance as

interpreted by state law. If the reversion would be triggered under state law, as the court assumes is the case, ICC's continued exercise of jurisdiction over the right-of-way interferes with and defeats state recognized property rights which otherwise vest and become presently possessory.

National Wildlife further reinforces this position. There, ICC, similar to the decision below, argued that because Section 1247(d) specifies that trail use shall not constitute abandonment, the reversionary interests do not mature and there can thus be no taking. *National Wildlife*, 850 F.2d at 704. The *National Wildlife* court recognized that this logic evades but does answer the takings question.

"This response may accurately describe the effect of . . . [Section 1247(d)], but it does not resolve the question posed by petitioner Beres, namely, whether the postponement of a reversionary interest that would otherwise vest under state law constitutes a taking." *Id.*

In answering the takings question the reversionary interest is properly viewed as having vested pursuant to state law but the interest has been preempted from becoming effective by the operation of Section 1247(d). This is consistent with the rules for compensation for future interests.

"If, at time of taking, the event upon which property is to revert is imminent, and its occurrence within a reasonably short time probable, the future interest holder is entitled to compensation." *Lawson*, 730 P.2d at 1315-16 (citing 2 J. Sackman, *Nichols on Eminent Domain*, § 5.05[1] (3d rev. ed. 1985)).

Similarly, the District of Columbia Circuit in *National Wildlife* found that the imminence of the vesting of the reversionary interest was sufficient to show that the interest is taken by the operation of Section 1247(d).

"[T]he Commission suggests that . . . the holder of a reversionary interest has nothing more than a *future interest* which might never mature and which is simply *postponed* in the event of a trail use arrangement [W]e notice that the Commission cites no authority for the proposition. The purported proposition of law is manifestly contrary to the underlying economics - analogous to saying that a lessor's interest in his property has not been 'taken' when the term of a fully paid leasehold is extended indefinitely. It is therefore not surprising that a number of sources suggest it is unsound, particularly when the event that will trigger the reversion of the interest is imminent at the time of the appropriation." *National Wildlife*, 850 F.2d at 704 (emphasis in original).

Because the petitioners here allege that the railroad right-of-way reverted under state law in 1975, the exercise of continuing jurisdiction by ICC pursuant to the authority in Section 1247(d) can only be properly characterized as a preemption of the state law. Of course, preemption of state law does not preclude the takings issue.

"EPA encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a 'pre-emption' of whatever property rights Monsanto may have had in those trade secrets This argument proves too much. If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Takings Clause has lost all vitality." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1012.

Section 1247(d) preempts state law by cutting off for an indefinite period of time otherwise vested property rights. Under the applicable case law, this constitutes a taking. The fact that at some point in time the trail use may also cease and ICC will decide to relinquish jurisdiction does not change the takings analysis. Rather, such an occurrence would merely convert the taking into a temporary one and compensation need only be paid for the time that the taking was effective. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ___, 96 L. Ed. 2d 250, 268 (1987).

CONCLUSION

Whether Section 1247(d) authorizes the taking of property without compensation is an issue needing definitive resolution by this Court. Two circuits of the Court of Appeals are irreconcilably split and the result is uncertainty over the proper application of the "rails to trails" policy and the likelihood of similarly situated property owners being subject to varying degrees of constitutional protection. The present case should now be reviewed, not only to resolve this issue and prevent the

injustices that would otherwise result, but also to remove the conclusory and incorrect takings analysis contained in the opinion below.

DATED: January, 1989.

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JOINT APPENDIX

(4)
No. 88-1076

Supreme Court, U.S.
FILED

JUN 6 1989

IN THE
Supreme Court of the United States
ROBERT F. SPANIOLO, JR.
CLERK

OCTOBER TERM, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

vs.

**INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,**
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 23, 1988
CERTIORARI GRANTED APRIL 24, 1989

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/17/85	Petition for exemption from ICC jurisdiction or finding of abandonment, filed by neighboring property owners
7/23/85	Protest filed by State
7/24/85	Joint Reply to Petition by State and Vermont Railway
8/2/85	Protest filed by City of Burlington
8/2/85	Reply to Petition by City of Burlington
11/21/85	Verified Notice of Exemption, filed by State and Vermont Railway
11/25/85	Motion for Consolidation, filed by property owners
11/25/85	Motion for Summary Rejection by property owners
11/28/85	Reply to Motion for Summary Rejection by State
12/17/85	Corrected Verified Notice of Exemption, filed by State and Vermont Railway
1/6/86	ICC decision dismissing property owners' petition

1/15/86 Petition for Stay by property owners
1/27/86 Petition for Reconsideration by property owners
2/3/86 Reply to Petition for Reconsideration by State
2/6/86 Reply to Petition for Reconsideration by City
2/7/86 ICC decision denying Petition for Stay
7/17/87 ICC decision denying Petition for Reconsideration
9/18/87 Petition for Review of ICC decision
8/4/88 Court of Appeals' decision
9/28/88 Court of Appeals' denial of Petition for Rehearing
12/23/88 Petition for Certiorari filed
4/24/89 Certiorari granted

Clarke A. Gravel, Esquire
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INTERSTATE COMMERCE COMMISSION
DOCKET NO. _____

IN RE: STATE OF VERMONT AND
VERMONT RAILWAY, INC.

TRUSTEES OF THE DIOCESE OF VERMONT;
BURLINGTON LODGE NO. 916,
BENEVOLENT AND PROTECTIVE ORDER OF ELKS;
AND J. PAUL PRESEALT AND
PATRICIA PRESEALT,
Petitioners

v.

STATE OF VERMONT AND
VERMONT RAILWAY, INC.,
Respondents

Petition by Non-Carriers for a Determination of
Exemption from Jurisdiction of the Interstate Commerce
Commission and/or Finding of *De Facto* Abandonment

Petitioners, by and through their attorneys, Gravel and Shea, hereby request that the Interstate Commerce Commission, pursuant to 49 U.S.C. §10505 and 49 C.F.R. §1117.1, find and determine that the persons who are parties hereto, and the rail carrier service which Respondents are otherwise authorized to conduct over a certain portion of the line of railroad described herein, are exempt from the jurisdiction of the Interstate Commerce Commission. Alternatively, or in addition, Petitioners request that the Commission find that Respondents have in fact discontinued and abandoned all railroad service on the line of railroad at issue herein.

1. Petitioners are residents of the City of Burlington, Chittenden County, State of Vermont, and are owners of real property situated immediately adjacent to certain portions of a line of railroad previously operated and/or owned by Respondents or their predecessors, and as such are interested parties under 49 U.S.C. §10505(b).

2. Respondents are presently the owner and operator, respectively, of the same certain portions of a line of railroad situated in the City of Burlington, Chittenden County, State of Vermont.

3. The Interstate Commerce Commission (ICC), referencing Finance Docket No. 22830, in *ICC Report and Order*, dated December 20, 1963, 320 I.C.C. 330, and in its *Second Supplement Order*, Docket No. 22830 (February 15, 1983), authorized the Respondent State of Vermont (State) to acquire portions of the line of railroad owned and formerly operated by the Rutland Railway Corporation, and to lease the line for operation by Respondent Vermont Railway, Inc. (Railway).

4. Prior to 1970, all railroad operations north of presently-designated milepost 124.6875 of the Railway (also designated as chaining post 6583+50 and formerly station 123.41) located in Chittenden County and northward in the State of Vermont were terminated and the tracks, switches, bridges and all other equipment north of that point to the Canadian border some 50 miles distant were forever removed.

5. The irretrievable removal and abandonment of all railroad operations north of milepost 124.6875, which was conducted pursuant to ICC order and authorization in *Rutland Railway Corporation Abandonment of Entire Line*, 317 I.C.C. 393 (1962), included dismantling and complete removal of crucial bridges which had theretofore spanned the Winooski River in Chittenden County and portions of Lake Champlain in and between Chittenden and Grand Isle

Counties, without which railroad operations could not be conducted or restored except at prohibitive expense.

6. In approximately 1973, and prior to 1975, Respondents removed and dismantled all track, signals and all other railbed facilities, from milepost 124.6875 (chaining station 6583+50) southward through the City of Burlington to milepost 123.342 (chaining station 6512+44 and formerly station 91.26).

7. Petitioners' property abuts at various points the former line of railroad and right-of-way abandoned and dismantled by the Respondents in 1973 and prior to 1975, as described in paragraph 6 above.

8. The unilateral abandonment and removal of all railroad operations, service and physical facilities described in paragraph 6 above was undertaken by Respondents without order, approval or authorization of the Interstate Commerce Commission, and neither Respondent has ever applied to the Commission for a certificate of convenience and necessity permitting such discontinuance and abandonment.

9. Easements only to operate a railroad over the right-of-way in question (*i.e.*, between present mileposts 123.342 and 124.6875) were obtained by Railway's initial predecessor, in 1899, when, acting pursuant to an Act of the Vermont General Assembly, the Rutland-Canadian Railroad Company obtained Commissioners' awards permitting the taking of easements for railroad purposes only. Certified copies of the Awards are attached hereto as Exhibits 1 and 2 and made a part of this Petition.

10. Petitioners, abutting landowners to that section of abandoned right-of-way, claim present ownership of the right-of-way between said points by virtue of state law governing the devolution and reversion of easements upon the cessation of railroad operation.

11. Petitioners herein, with others, brought an action to quiet title to the right-of-way under date of June 1, 1981, and

by a decision issued April 19, 1985, the Supreme Court of Vermont affirmed the lower court's dismissal of the action for lack of subject matter jurisdiction, finding that a determination regarding the issue of abandonment would interfere with the Interstate Commerce Commission's alleged plenary authority and jurisdiction in this matter.

12. The State and the Railway have to date failed to apply to this Commission for a proper certificate of convenience and necessity to authorize abandonment of the subject railroad lines, even though all railroad operations have in fact been irretrievably discontinued and abandoned since approximately 1973. Respondents State and Railway are impermissibly using the Commission and their own violation of the law to circumvent and frustrate Petitioners' clear property rights under Vermont state and constitutional law.

13. Pursuant to 49 U.S.C. §10505, and because of Respondents' clear and unilateral abandonment and discontinuance of all railroad operations between mileposts 123.342 and 124.6875, all persons who are parties hereto, and the rail carrier service previously authorized to be operated by Respondent Railway between such points, should be exempted from any further jurisdiction of the Interstate Commerce Commission with respect to said portion of right-of-way, because further application of the provisions of the Act as amended are not necessary to carry out the stated transportation policy of the United States, and because the portion of right-of-way involved is of limited scope and there are no shippers left on said abandoned right-of-way who need to be protected from market abuse.

14. Alternatively, or in addition, Petitioners request that this Commission find that Respondents have in fact discontinued and abandoned all railroad operations between mileposts 123.342 and 124.6875, which is beyond genuine dispute under definitions of abandonment previously announced by the Commission.

WHEREFORE, Petitioners respectfully request that the Commission find that the parties hereto and the portion of the right-of-way in question are exempt from the further jurisdiction of the Interstate Commerce Commission, and further find that the Respondents have in fact discontinued and abandoned all railroad operations over said portion of right-of-way.

Dated at Burlington, in the County of Chittenden and State of Vermont, this 15th day of July, 1985.

Respectfully submitted by,

GRAVEL and SHEA
Attorneys for Petitioners

By: /s/ Clarke Gravel
Counsel

[CERTIFICATE OF SERVICE NOT PRINTED; COMMISSIONERS' AWARD TO WILLIAM H. H. BARKER ESTATE FROM RUTLAND-CANADIAN RAILROAD COMPANY PRINTED AT OPP APP 7a]

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. _____

STATE OF VERMONT AND
VERMONT RAILWAY, INC.

(TITLE OMITTED IN PRINTING)

State of Vermont's Protest in Response to
"Petition by Non-Carriers for a Determination of
Exemption from Jurisdiction of the Interstate Commerce
Commission and/or Finding of *De Facto* Abandonment"

NOW COMES the State of Vermont, by Attorney General Jeffrey L. Amestoy, through Assistant Attorney General John K. Dunleavy, and pursuant to 49 C.F.R. §1152.25 protests to the Commission the July 15, 1985 "Petition by Non-Carriers for a Determination of Exemption for Jurisdiction of the Interstate Commerce Commission and/or Finding of *De Facto* Abandonment":

1. Protestant is the State of Vermont, by its Agency of Transportation; 133 State Street; Montpelier, Vermont 05602. Protestant is a sovereign state.
2. The State of Vermont does not, as a shipper, use the subject railroad line (*i.e.*, the Vermont Railway from MP

123.342 to MP 124.6875, sometimes referred to hereinafter as the "North Burlington branch").

3. The State of Vermont purchased approximately 131.6 miles of railroad from the Rutland Railway Corp. on January 1, 1964. On January 6, 1964 the 131.6 miles were leased to the Vermont Railway, Inc. That lease, as amended and renewed, remains in force. On June 18, 1985, the State of Vermont, joined by Vermont Railway, Inc., leased the 1.8 mile North Burlington branch to the City of Burlington for use as a bicycle and pedestrian path. (A copy of said lease is attached hereto as "Exhibit A"). In addition to representing its interest as owner/lessor, the State represents a broad public interest in retaining state-owned railroad rights-of-way "for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes." 1982 Vt. Acts. [1981 Adj. Sess.] No. 187, §1 (now codified at Vt. Stat. Ann. tit. 30, §711).

4. The State of Vermont is opposed to abandonment of any portion of the Vermont Railway line between MP 123.342 and MP 124.6875.

5. The State opposes the abandonment for the following specific reasons:

a. The State of Vermont was a pioneer in constructive governmental response to threatened railroad abandonments. Since purchasing the 131.6 mile Bennington-Burlington segment of the former Rutland Railway in 1964 (including the line that is the subject of the pending application), the State of Vermont has purchased the Bellows Falls-Rutland segment of the Rutland, and the entire lines of the former St. Johnsbury & Lamoille County and Montpelier & Barre railroads. In addition, the State has purchased the Vermont portion of the Delaware & Hudson's former Rutland & Washington branch. The Vermont legislature consistently has demonstrated its determination

that these lines should be preserved, preferably for active railroad operations but, failing, that, "banked" in anticipation of future railroad or other transportation use.

b. In this particular case, the northernmost 1.3 miles of rail were removed in 1975 because of an acute need for relay rail on the Vermont Railway's lines south of Burlington. There was no intention, then or at any subsequent time, to permanently abandon the portion of the line from which the rails were removed. The rails have not been replaced because, at present, there are no shippers along the line who need railroad service.

c. The City of Burlington purchased the remainder of the right-of-way within the city limits (*i.e.*, from MP 124.6875 north to the mouth of the Winooski River) directly from the Rutland Railway on May 24, 1965. For over 20 years, the City has used this land as a bicycle and pedestrian path. In recent years, the City has been negotiating with the State and the Vermont Railway to extend this use by leasing portions of the right-of-way south of MP 124.6875 not presently required for active railroad operations. On June 18, 1985, the aforementioned 30-year lease was signed. In considering the pending application for abandonment, several key points concerning this lease should be noted:

i. The City has agreed to maintain the railroad grade (including bridges, culverts, retaining walls, etc.), thus ensuring that restoration of railroad service will be a relatively simple matter of installing new ties, rails, and ballast.

ii. The Vermont Railway's lease with the State calculates rental payments on a percentage of revenues, rather than on miles of track

operated or acreage leased. The City of Burlington now has assumed complete responsibility for maintaining the North Burlington right-of-way as well as for any liability associated with use of the right-of-way. The Vermont Railway incurs no property tax liability on account of its remaining interest in the line. In short, it is impossible, by any stretch of the imagination to see how continuation of the *status quo* possibly will burden interstate commerce.

iii. Should there be a renewed need for railroad service over the subject line, the lease can be terminated by the State or the Vermont Railway on six months' notice to the City, thus clearing the right-of-way for reconstruction of the railroad tracks. This is more than enough lead time for the State and the Vermont Railway to meet the needs of any *bona fide* shipper who might be interested in locating along the time.

6. The State wishes to rebut several of the points raised in the materials submitted by the petitioners:

a. The legislative act chartering the Rutland-Canadian Railroad Company, without any qualification, granted that corporation the right of eminent domain. In addition, the Rutland-Canadian was granted all the privileges and rights given by the general law to railroad companies. Much of the subject right-of-way was acquired by purchase, as evidenced by typical Vermont warranty deeds. The Rutland-Canadian indisputably acquired a fee simple absolute estate in such parcels. The so-called commissioners' awards, evidencing the Rutland-Canadian's resort to the power of eminent domain, are devoid of reversionary clauses or other

language indicating that anything less than a fee simple interest was taken. Accordingly, in view of the rule that an unqualified taking by eminent domain takes all interests, it is the State's position that the Rutland-Canadian took a fee simple interest in the condemned lands as well as in those acquired by purchase.

b. Even assuming, *arguendo*, that the Rutland-Canadian took only a railroad easement under general Vermont law, removal of the tracks, without more, does not entitle abutting landowners to automatic reversion. Vermont law is clear that an easement taken by condemnation for one viatic purpose is held in trust for the public and later may be applied to another viatic or other public use without precipitating a reversion or, in most instances, any need to pay additional compensation to the owners of the servient estates.

c. Petitioners appear to have confused the Vermont Railway's 1975 removal of the 1.3 miles of track between MP 123.342 and MP 124.6875 with the Rutland Railway's 1964 abandonment of the tracks from MP 124.6875 north through the Lake Champlain Islands to the Canadian border. The latter abandonment occurred pursuant to authorization received from the Commission in 1962. The Vermont Railway never has had operating authority north of MP 124.6875.

d. The Vermont Railway's 1975 retrenchment in North Burlington was prompted by two operational considerations. The first consideration was that the only shipper on the line, the Consolidated Rendering Company ("Corenco") had gone out of business and its plant site had been acquired by the City of Burlington for a public park and beach (now Leddy Park). The second was an acute need

for so-called "105 pound Dudley section" rail for repairs on the line south of Burlington. In 1975, the Vermont Railway, the Green Mountain Railway, and the State of Vermont were preparing for the Vermont Bicentennial Steam Expedition, a passenger excursion to be operated during the 1976 season between Bellows Falls and Burlington and between Bennington and Burlington. A Sperry rail detector test in late 1975 disclosed the previously unsuspected existence of a number of defective rails on the Vermont Railway. With the State's approval, the decision was made to use the North Burlington branch as a source of replacement rail.

e. At present, the North Burlington branch is intact as far north as MP 123.342. From that point north to MP 124.6875, the rails and ties are gone but all bridges, culverts, retaining walls, etc. remain. Petitioners' self-serving contentions notwithstanding, the line has not been "irretrievably abandoned".

f. On June 18, 1985, the State of Vermont, joined by the Vermont Railway, entered into a lease agreement with the City of Burlington. The portion of the line from which the rails were removed in 1975 (MP 123.342 to MP 124.6875) was leased to the City immediately; the remaining portion of the line (MP 122.891 to MP 123.342) will be leased as soon as the Vermont Railway completes reconstruction of a storage siding on which to relocate the boxcars presently stored on the North Burlington branch and then removes its tracks south to MP 122.891. The City has been authorized to pave the vacated track bed for use as a bicycle and pedestrian path; however, it is obligated to maintain the railroad grade. Either the State or Vermont Railway can cancel the lease on

six months' notice should railroad operating needs require.

7. Under the circumstances, the State has no objection to the Commission's dismissing the petition without oral hearing. However, if the Commission feels that the issues raised by the petitioners merit consideration, then the State requests an oral hearing.

8. In light of the existing lease arrangements between the State and the Vermont Railway and among the State, the Vermont Railway, and the City of Burlington, the State believes that the carrier has been completely relieved of any financial obligations, direct or indirect, that might arise from its interest in the North Burlington branch. Hence there is no need to offer financial assistance to the carrier.

9. The proposed abandonment would not have any direct environmental impact from diversion of traffic in that there has not been any traffic over the subject line for at least 10 years. Over the long term, however, it could have a very serious impact, especially if it assists petitioners in forcing a reversion of portions of the right-of-way. Such a reversion would thwart continued public use of the right-of-way as a bicycle and pedestrian path and would preclude future use for railroad or other transportation purposes. Much of the right-of-way is either on or very close to the shore of Lake Champlain and, in the event of a reversion, would be subject to intense development pressure.

10. As the right-of-way passes through an urban area, the proposed abandonment would not have any impact on rural development. However, there would be a severe impact on rural development should abandonment lead to a reversion. The right-of-way would be interrupted in several places and no longer would be available for full public use. It is likely that at least some portions of the right-of-way would be developed.

11. The State of Vermont believes that the right-of-way is well-suited to a number of public uses. The most obvious is

a southward extension of the City of Burlington's existing bicycle and pedestrian path. The North Burlington area, which has undergone substantial growth in the post-World War II period, is connected to the rest of the City by only three corridors: North Avenue, State Route 127, and the former Rutland Railway. North Avenue is narrow and heavily trafficked. Route 127 is a high speed, limited access highway that is inappropriate for bicycle and pedestrian use. The railroad right-of-way, however, has few grade crossings and is ideally suited to use as a bicycle and pedestrian path. It follows a gentle grade along the eastern shore of Lake Champlain and has superb views of the Lake and the Adirondack mountains on the New York shore. The route connects existing park land at Leddy Park and North Beach with a proposed redevelopment of Burlington's central waterfront area that will feature public use areas. The right-of-way is broad enough — ranging in width from 82.5 feet to 148.5 feet — to provide adequate space for the bicycle path, drainage ditches, and buffer zones on both sides. In the long-term, it is conceivable that the right-of-way could see renewed railroad use as a local freight line, a light-rail transit route, or as a link in a proposed high-speed passenger railroad (currently being studied by the states of New York and Vermont and the province of Quebec) that would link New York City, Albany, Burlington, and Montreal along the eastern shores of the Hudson River and Lake Champlain.

12. The State of Vermont does not believe that petitioners have shown adequate justification for forcing the State and the Vermont Railway to abandon the line. However, should the Commission see fit to grant the petition, the State submits that the Commission should find the right-of-way suitable for continued public use. At present, the most appropriate such use would be as a recreational trail corridor for hiking and bicycling. Future public uses might include public mass transit or resumption of railroad freight and/or passenger service. In particular, the State would request the Commission to find that the June 18, 1985 lease from the

State of Vermont and the Vermont Railway to the City of Burlington is consistent with the public use requirements of 49 U.S.C. §10906, and as a condition to abandonment, should require such lease to remain in full force and effect.

DATED at Montpelier, Vermont, this 18th day of July, 1985.

JEFFREY L. AMESTOY
ATTORNEY GENERAL

BY: /s/ John K. Dunleavy
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Assistant Attorney General

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. _____

STATE OF VERMONT AND
VERMONT RAILWAY, INC.

(TITLE OMITTED IN PRINTING)

Joint Reply of State of Vermont and Vermont Railway, Inc.
to July 15, 1985 "Petition by Non-Carriers for a
Determination of Exemption from Jurisdiction of
the Interstate Commerce Commission and/or
Finding of *De Facto* Abandonment"

NOW COME the State of Vermont, by Attorney General
Jeffrey L. Amestoy, through Assistant Attorney General John
K. Dunleavy, and the Vermont Railway, Inc., by and through
John R. Pennington, its President and duly authorized agent,
and hereby make the following reply to the July 15, 1985
"Application by Non-Carriers for a Determination of

Exemption from Jurisdiction of the Interstate Commerce Commission and/or Finding of *De Facto* Abandonment";

1. The allegations set forth in the first numbered paragraph are ADMITTED, except that it is DENIED that petitioners are interested parties within the meaning of 49 U.S.C. § 10505(b) and that 49 U.S.C. § 10505 in any manner supersedes 49 U.S.C. §§ 10901-09 (the sections of the Interstate Commerce Act dealing specifically with abandonment of railroad operations and lines).

2. The allegations set forth in the second numbered paragraph are ADMITTED.

3. The allegations set forth in the third numbered paragraph are ADMITTED.

4. It is ADMITTED that the former Rutland-Railway Corp. line north of chaining station 6583+50 (MP 124.6875) to Rouses Point, N.Y. and the Canadian border was authorized to be abandoned by *Rutland Railway Corporation Abandonment of Entire line*, 317 I.C.C. 393 (1962) and that the track located thereon was in fact dismantled and sold for scrap by the Rutland in late 1964 or early 1965.

5. It is ADMITTED that the former Rutland Railway Corp. line north of chaining station 6583+50 (MP 124.6875) was dismantled in 1964 or 1965. However, it is DENIED that such dismantling precluded railroad operations south of chaining station 6583+50 (MP 124.6875). The only "bridges" along the subject route, the pedestrian and highway underpasses at North Beach (just north of chaining station 6512+44 [MP 123.342]) and the Rock Point highway overpass (chaining station 6530+00 [MP 123.674]) are intact and available for future railroad use, as are all culverts, retaining walls, etc. The track itself is intact as far north as chaining station 6512+44 (MP 123.342).

6. It is ADMITTED that around 1975 the State of Vermont's lessee, the Vermont Railway, Inc., removed about 1.3 miles of track between chaining station 6512+44 (MP

123.342) (said point corresponding approximately to station 87+58 on the July 24, 1899 location of the Rutland-Canadian Railroad Co.) and chaining station 6583+50 (MP 124.6875) (corresponding to Rutland-Canadian station 158+77). It is DENIED that the underlying roadbed has been disturbed in any substantial way.

7. It is ADMITTED that lands owned by the Trustees of the Diocese of Vermont abut some or all of the railroad right-of-way between chaining stations 6516+12 (MP 123.411) and 6541+86.1 (MP 123.899) and that lands owned by the Elks Club and the Preseaults abut portions the railroad right-of-way between chaining stations 6541+86.1 (MP 123.899) and 6548+20.1 (MP 124.019).

8. It is ADMITTED that neither the State nor the Vermont Railway, Inc. has applied to this Commission under the Interstate Commerce Act, 49 U.S.C. §10901 *et seq.*, for abandonment of the subject railroad line or for discontinuance of operations over said line. The remaining allegations set forth in the eighth numbered paragraph are DENIED.

9. It is ADMITTED that the railroad right-of-way between chaining station 6488+65 (MP 122.891) and 6538+50 (MP 124.6875) was assembled in 1899 and 1900 by the Rutland-Canadian Railroad Co. Said corporation was chartered by 1898 Vt. Acts. No. 160, "An Act to Incorporate the Rutland-Canadian Railroad Company", which *inter alia*, provided that:

Said corporation shall have and enjoy the right of eminent domain [and] may receive, take, hold, purchase, use and convey such real and personal estate as is necessary or proper in the judgment of such corporation, for the construction, maintenance and accommodation of such railroad as aforesaid, and its structures and appurtenances, and as the purposes of the corporation may require: *** and as such corporation, shall have the powers, rights,

privileges and franchises incident to railroad companies and other corporations.

Id., § 1. It is ADMITTED that the State of Vermont's title and interest in the subject line of railroad ultimately is derived from the Rutland-Canadian Railroad Co., through its corporate successors, the Rutland Railroad Co. (after October 29, 1900), and the Rutland Railway Corp. (after November 1, 1950). It is DENIED that the Rutland-Canadian acquired merely "easements for railroad purposes only". (An abstract of the instruments evidencing the Rutland-Canadian's right-of-way acquisitions for the subject railroad line is attached hereto as "Exhibit A" and is incorporated herein by reference.) It is ADMITTED that copies of the 1899 commissioners' awards to the Vermont Episcopal Institute and the Barker Estate were attached to the petition.

10. It is ADMITTED that petitioners claim ownership of the right-of-way between said points by virtue of state law governing the devolution of easements upon the cessation of railroad operation; however, it is DENIED that their claim is valid.

11. The allegations set forth in the eleventh numbered paragraph are ADMITTED.

12. It is ADMITTED that neither the State nor the Vermont Railway, Inc. has applied to the Commission under the Interstate Commerce Act, 49 U.S.C. § 10901 *et seq.*, for abandonment of the subject railroad line or for discontinuance of operations over said line. The remaining allegations set forth in the twelfth numbered paragraph are DENIED.

13. The allegation set forth in the thirteenth numbered paragraph are DENIED.

14. The allegation set forth in the fourteenth numbered paragraph are DENIED.

Defenses

1. The petitioners represent private interest only and therefore lack standing to apply for abandonment under the Interstate Commerce Act, 49 U.S.C. § 10901 *et seq.*

2. The petitioners have failed to follow the proper procedures for filing an application to abandon under the Interstate Commerce Act, 49 U.S.C. §§ 10903-04, and its implementing regulations, 49 C.F.R. §§ 1152.1 *et seq.*

3. The petitioners have failed to comply with the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 *et seq.* and 49 C.F.R. §§ 1105.1 - 1105.12.

4. The petitioners have failed to comply with the Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq.* and 49 C.F.R. §§ 1106.1 - 1106.8.

5. The petitioners have failed to state a claim upon which relief can be granted by the Commission.

DATED at Montpelier, Vermont, the 19th day of July, 1985.

STATE OF VERMONT
JEFFREY L. AMESTOY
ATTORNEY GENERAL

BY: /s/ John K. Dunleavy
JOHN K. DUNLEAVY
Assistant Attorney General

DATED at Burlington, Vermont, this 19th day of July 1985.

VERMONT RAILWAY, INC.

BY: /s/ John R. Pennington
JOHN R. PENNINGTON
President and Duly
Authorized Agent

[VERIFICATION AND CERTIFICATE OF SERVICE NOT
PRINTED; EXTRACTS FROM LEASE PRINTED AT OPP
APP 17a]

John T. Leddy, Esq.
McNeil, Murray & Sorrell, Inc.
271 South Union Street
Burlington, VT 05401
(802) 863-4531
Attorney for City of Burlington

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. _____

CITY OF BURLINGTON, VERMONT

TRUSTEES OF THE DIOCESE OF VERMONT;
BURLINGTON LODGE NO. 916,
BENEVOLENT AND PROTECTIVE ORDER OF ELKS;
AND J. PAUL PRESEAUT AND
PATRICIA PRESEAUT v. STATE OF VERMONT
AND VERMONT RAILWAY, INC.,

City of Burlington, Vermont's Protest in Response to
"Petition by Non-Carriers for a Determination of
Exemption from Jurisdiction of the Interstate Commerce
Commission and/or Finding of *De Facto* Abandonment."

NOW COMES the City of Burlington, Vermont, by and
through its attorney, John T. Leddy, Esq. of the law firm of
McNeil, Murray & Sorrell, Inc., pursuant to 49 C.F.R.
§1152.25, and hereby protests to the Commission the
"Petition by Non-Carriers for a Determination of Exemption
for Jurisdiction of the Interstate Commerce Commission
and/or Finding of *De Facto* Abandonment," dated July 15,
1985, filed herein.

The City of Burlington is a lessee of the railroad right-of-
way which is the subject matter of the instant Petition,

pursuant to the terms of a certain Lease Agreement, dated June 18, 1985 entered into by the State of Vermont, Vermont Railway, Inc., and the City of Burlington. A copy of said in response to said Petition, dated July 18, 1985, as Exhibit A.

In support of its Protest, the City of Burlington joins in and relies upon the points and authorities cited in the State of Vermont's Protest in response to said Petition, dated July 18, 1985.

Dated at Burlington, Vermont this 30th day of July, 1985.

CITY OF BURLINGTON

By: /s/ John T. Leddy
John T. Leddy, Esq.
A Member of the Firm
McNeil, Murray & Sorrell, Inc.
Attorney for the City of
Burlington, Vermont

[CERTIFICATE OF SERVICE NOT PRINTED;
EXTRACTS FROM LEASE PRINTED AT OPP ALL 17a]

John T. Leddy, Esq.
McNeil, Murray & Sorrell, Inc.
271 South Union Street
Burlington, VT 05401
(802) 863-4531
Attorney for City of Berlington

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. _____

CITY OF BURLINGTON, VERMONT

(TITLE OMITTED IN PRINTING)

Reply of City of Burlington, Vermont to July 15, 1985
"Petition by Non-Carriers for a Determination of
Exemption from Jurisdiction of the Interstate Commerce
Commission and/or Finding of *De Facto* Abandonment."

NOW COMES the City of Burlington, Vermont, by and through its attorney, John T. Leddy, Esq. of the law firm of McNeil, Murray & Sorrell, Inc., and hereby makes the following reply to the "Petition by Non-Carriers for a Determination of Exemption from Jurisdiction of the Interstate Commerce Commission and/or Finding of *De Facto* Abandonment," date July 15, 1985, filed herein:

1. The allegations set forth in Paragraph 1 are ADMITTED, except that it is DENIED that Petitioners are interested parties within the meaning of 49 U.S.C. §10505(b), and that 49 U.S.C. §10505 in any manner supercedes 49 U.S.C. §§10901-10909.

2. The allegations set forth in Paragraph 2 are ADMITTED.

3. The allegations set forth in Paragraph 3 are ADMITTED.

4. The allegations set forth in Paragraph 4 are ADMITTED.

5. The allegations set forth in Paragraph 5 are ADMITTED.

6. It is ADMITTED that around 1975, the State of Vermont's Lessee, Vermont Railway, Inc., removed approximately 1.3 miles of track between Chaining Station 6512+44[MP 123.342] and Chaining Station 6583+50 [MP 124.6875]. It is DENIED that the underlining roadbed has been disturbed in any substantial way.

7. It is ADMITTED that lands owned by the Trustees of the Diocese of Vermont abut some or all of the railroad right-of-way between Chaining Stations 6516+12[MP 123.411] and 6541+86.1[MP 123.899], and that lands owned by the Elks Club and the Preseaults abut portions of the railroad right-of-way between Chaining Stations 6541+86.1[MP 123.899] and 6548+20.1[MP 124.019]. The remaining allegations set forth in Paragraph 7 are DENIED.

8. It is ADMITTED that neither the State nor Vermont Railway, Inc. has applied to this Commission under the Interstate Commerce Act, 49 U.S.C. §§10901 *et seq.*, for abandonment of the subject railroad line or for discontinuance of operations over subline. The remaining allegations set forth in Paragraph 8 are DENIED.

9. It is ADMITTED that the railroad right-of-way between Chaining Station 6488+65[MP 122.891] and 6583+50[MP 124.6875] was assembled in 1899 and 1900 by the Rutland-Canadian Railroad Company. It is ADMITTED that the State of Vermont's title and interest in the subject line of railroad ultimately is derived from the Rutland-Canadian Railroad Company, through its corporate successor, the Rutland Railroad Company, and the Rutland Railway Corp. It is DENIED that the Rutland-Canadian Railroad

Company acquired merely "easements for railroad purposes only." It is ADMITTED that copies of the 1899 Commissioner's Awards to the Vermont Episcopal Institute and the Barker Estate were attached to the Petition.

10. It is ADMITTED that the Petitioners claim ownership of the right-of-way between said points by virtue of State law governing the devolution of easements upon the cessation of railroad operation; however, it is DENIED that their claim is valid.

11. The allegations set forth in Paragraph 11 are ADMITTED.

12. It is ADMITTED that neither the State nor the Vermont Railway, Inc. has applied to this Commission under the Interstate Commerce Act, 49 U.S.C. §§10901 *et seq.*, for the abandonment of the subject railroad line or for discontinuance of operations over said line. The remaining allegations set forth in Paragraph 12 are DENIED.

13. The allegations set forth in Paragraph 13 are DENIED.

14. The allegations set forth in Paragraph 14 are DENIED.

Affirmative Defenses

1. The Petitioners represent private interests only, and therefore, lack standing to apply for abandonment under the Interstate Commerce Act, 49 U.S.C. §§10901 *et seq.*

2. Petitioners have failed to follow the proper procedures for filing an application to abandon under the Interstate Commerce Act, 49 U.S.C. §§10903-10904, and its implementing regulations, 49 C.F.R. §§1152.1 *et seq.*

3. The Petitioners have failed to comply with the National Environmental Policy Act of 1969, 42 U.S.C. §§4332 *et seq.*, and 49 C.F.R. §§1105.1-1105.12.

4. The Petitioners have failed to comply with the Energy Policy and Conservation Act, 42 U.S.C. §§6201 *et seq.* and 49 C.F.R. §§1106.1-1106.8.

5. The Petitioners have failed to state a claim upon which relief can be granted by the Commission.

Dated at Burlington, Vermont this 30th day of July, 1985.

CITY OF BURLINGTON

By: /s/ John T. Leddy
John T. Leddy, Esq.
A Member of the Firm
McNeil, Murray & Sorrell, Inc.
Attorney for City of
Burlington, Vermont

[CERTIFICATE OF SERVICE NOT PRINTED]

Clarke A. Gravel, Esquire
Gravel and Shea
P. O. Box 1049
Burlington, VT 05402

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-265 (Sub-1X)

STATE OF VERMONT AND
VERMONT RAILWAY, INC.,

DISCONTINUANCE OF SERVICE OVER
NORTH BURLINGTON BRANCH IN
CHITTENDEN COUNTY, VERMONT

MOTION FOR SUMMARY REJECTION

Now come Trustees of the Diocese of Vermont; Burlington Lodge No. 916, Benevolent and Protective Order of Elks; and J. Paul Preseault and Patricia Preseault, who are "interested parties" pursuant to 49 U.S.C. §10505(b), and hereby move the Interstate Commerce Commission pursuant to 49 CFR §1152.50(d)(3) to summarily reject the Verified Notice of Exemption filed by Petitioners State of Vermont and Vermont Railway, Inc., on the grounds that it contains false and misleading information. Moreover, the exemption procedure contemplated under 49 CFR §1152.50 is by its very terms inapplicable to the remedy which Petitioners have sought.

1. The Notice states that the "proposed consummation date for discontinuance of service is January 15, 1986." *This is false and misleading* even on the face of the notice itself, since in the very next breath Petitioners certify that no traffic has moved over the line in more than two years. Service

cannot be discontinued at a future date when in fact service has already been discontinued many years in the past. Moreover, before this Commission itself Petitioners have already represented as facts in the companion proceeding that "1.3 miles of rail [of 1.8 miles of right-of-way involved] were removed in 1975" and that at that time "the *only* shipper on the line, the Consolidated Rendering Company ("Corenco") had gone out of business." Docket No. 30720, State of Vermont's Protest in Response, dated July 18, 1985, at ¶¶ 5(b), p. 3, and 6(d), p. 7 (emphasis supplied).

Clearly, then, Petitioners here have already acknowledged that all service was discontinued on this line in 1975 when most of the tracks were removed. Under those circumstances it is equally clear that their instant representation that discontinuance of service will be consummated January 1, 1986, some *ten (10) years after-the-fact*, is false and misleading. The Commission should accordingly reject the notice summarily under 49 CFR §1152.50(d)(3).

If the Notice is not rejected summarily, a motion to stay the effective date of the exemption will be filed, and these parties will seek at that time to present evidence to the Commission concerning the truth of Petitioners' discontinuance and abandonment of the subject line of railroad.

2. Petitioners seek to use the exemption procedure provided under 49 U.S.C. §1152.50 "only to discontinue service"; they expressly disavow any intention "to abandon any property." Verified Notice, ¶(f), at p. 5. As such §1152.50 is clearly inapplicable, since it relates only to "proposed *abandonments*" which would otherwise be subject to 49 U.S.C. §§10903-05 (emphasis supplied). While the latter statutes speak to both discontinuance and abandonment, the Commission's *regulation* under which Petitioners seek exemption speaks only of abandonments. Petitioners cannot rewrite §1152.50 for their own purposes nor twist it contrary to its unambiguous language.

Since the Verified Notice fails to ask for any relief which may be granted under the express terms of 49 CFR §1152.50, the Notice should be summarily rejected by the Commission for that reason as well.

3. The opinion of Petitioners' counsel as to the State of Vermont law on title to the underlying right-of-way is certainly disputed, and does not state a *fact* upon which the Commission is entitled to act. To the extent the Verified Notice implies otherwise, it is again false and misleading and subject to summary rejection under 49 CFR §1152.50(d)(3).

4. All of the public use and benefit statutes, both state and federal, upon which Petitioners base their public policy arguments, were *enacted after* the discontinuance and abandonment had already taken place here in 1975. To the extent that Petitioners rely upon such legislation alone to convert the right-of-way to public use without just compensation, grave constitutional questions are raised under both the Vermont and United States Constitutions. Ultimately what must be resolved, in the state courts after this Commission has either declined jurisdiction, issued an exemption under 49 U.S.C. §10505, or found an actual discontinuance and abandonment in 1975, are these very questions of title and whether or not under state law there has been a reversion of the railroad right-of-way.

Petitioners here simply seek, as they have continuously, to avoid a day of reckoning on those issues by using this Commission as both a shield and a sword. For ten years they sought to avoid their duty under federal law to apply to this Commission for permission to discontinue and abandon operations; now suddenly they rush in with an emergency petition for *exemption* from such requirements with a Verified Notice that is false and misleading and which is ineffective in any event under the very regulation relied upon. Such strategic maneuvering should not be condoned or accepted by the Commission.

CONCLUSION

For all of the reasons stated above, it is respectfully submitted that Petitioners' Verified Notice of Exemption should be summarily rejected.

Dated at Burlington, Vermont, this 21st day of November, 1985.

The Trustees of the Diocese of Vermont;
Burlington Lodge No. 916, Benevolent and
Protective Order of Elks, and J Paul Preseault
and Patricia Preseault

By: /s/ Clarke A Gravel
Clarke A. Gravel, Esq.
Gravel and Shea
P.O. Box 1049
Burlington, VT 05402

[pw24b]

[CERTIFICATE OF SERVICE NOT PRINTED]

John K. Dunleavy
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BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-265 (Sub-1X)

STATE OF VERMONT AND
VERMONT RAILWAY, INC.

DISCONTINUANCE OF SERVICE OVER
NORTH BURLINGTON BRANCH IN
CHITTENDEN COUNTY, VERMONT

Reply to Motion for Summary Rejection

NOW COMES the State of Vermont, by and through Attorney General Jeffrey L. Amestoy and Assistant Attorney General John K. Dunleavy, and makes the following reply to the November 21, 1985 "Motion for Summary Rejection," filed on behalf of the Trustees of the Diocese of Vermont; Burlington Lodge No. 916, Benevolent and Protective Order of Elks; and J. Paul Preseault and Patricia Preseault:

1. Movants are grasping at straws in asserting that, because it specifies January 15, 1986 as the proposed consummation date for formal discontinuance of service, the November 21, 1985 exemption notice is "false and misleading". Applicants have not attempted to conceal from the Commission the fact that the rails north of chaining station 6512+44 (MP 123.3416) were removed in 1975. To say the

least, it is disingenuous for movants in one breath to accuse the applicants of concealment and then, in the next, to "reveal" the true state of by quoting from applicants' own filings with the Commission.

In any event, a reading of 49 C.F.R. § 1152.50(d)(2) in context suggests that the "proposed consummation date" must refer to the date on which the carrier's legal obligation to provide service is expected to cease (assuming favorable action by the Commission under the regulatory timetable), rather than the actual date on which the last shipment moved over the subject rail line. To even invoke the § 1152.50 exemption procedure, a carrier must certify "that no local traffic has moved over the line for at least 2 years . . . and that no formal complaint filed by a user of rail service on the line . . . regarding cessation of service over the line either is pending with the Commission or has been decided in favor of the complainant within the 2-year period." 49 C.F.R. § 1152.50(b). Moreover, the regulations' history indicates a common sense recognition on the part of the Commission that it would be superfluous to give exhaustive administrative consideration to the needs of shippers where recent history conclusively demonstrates that such needs no longer continue:

A 2-year period is long enough to show that no subterfuge is involved and to allow shippers time to induce a resumption of service through negotiation or legal action.

Ex parte No. 274 (Sub. No. 8) — Exemption of Out of Service Rail Lines, 366 I.C.C. 885, 886 (1983).

In the present case, movants — who do not claim to be shippers — acknowledge the truthfulness of applicants' certification that more than 2 years have elapsed without any complaints from shippers or governmental units regarding cessation of service. Accordingly, it is perfectly proper for applicants to resort to the streamlined exemption procedure of § 1152.50:

[O]ur finding based on analysis of prior exemptions [is] that abandonment of lines out of service for at least 2 years has no competitive or operational impact, because it will usually pertain to short-line segments with no shippers. Further, regulation is not needed to protect shippers from the abuses of market power, because the lines have been out of service for at least 2 years.

Ex parte No. 274 (Sub. No. 8), *supra*, 366 I.C.C. at 892.

2. Movants are in error in asserting that 49 C.F.R. § 1152.50 exemption procedure applies only to proposals for total abandonment. As amended effective May 23, 1984, the § 1152.50 exemption procedure extends to proposals for discontinuance of service and trackage rights:

The Commission is expanding the exemption granted in *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885, which exempts abandonments of rail lines that have been out of service for at least 2 years by also exempting from regulation under 49 U.S.C. 10505 the discontinuance of service and of trackage rights over rail lines which have been out of service for at least 2 years. There is no evident need for the service and no shipper would be adversely affected by the discontinuance of trackage rights when no traffic has been handled locally on the line by the carrier seeking the discontinuance for at least 2 years. Carriers using this exemption will remain subject to standard employee protective conditions. The rule will allow rail carriers to file a notice of exemption which will be published in the *Federal Register* designating the line involved. . . .

49 Fed. Reg. 17002-03 (1984).

3. It is fatuous for movants to assert that the exemption notice, by including the opinion of counsel for the State as to title restrictions, violates 49 C.F.R. § 1152.50(d)(2). (By its

incorporation of § 1152.22[e][5], this section requires an applicant to disclose "any restriction of the title to the property, including any reversionary interest. . . ." The deeds and commissioners' awards by which the Rutland-Canadian roadway originally was acquired are devoid of explicit reversionary clauses. Therefore any discussion of title restrictions necessarily must involve legal opinions as to the effect of relevant statutes, rules of deed construction, and case law governing viatic easements. The exemption notice acknowledges that the opinion of counsel for the State is disputed by the abutters and makes reference to prior and pending litigation regarding the subject property. Unless one accepts the proposition that movants have a monopoly on truth and that all legal opinions save those of their own counsel are erroneous, applicants' exemption notice cannot be said to be "false and misleading".

4. The Commission should not shrink from its duty to determine the suitability of the right-of-way for interim public use (*see, e.g.*, 16 U.S.C. § 1247[d]; 49 U.S.C. § 10906; 49 C.F.R. § 1152.28[a][1]) because of movants' saber-rattling suggestion that "grave constitutional questions" loom. As the Commission itself has recognized:

Further, 49 U.S.C 10505 cannot exempt compliance with relevant energy and environmental acts. . . . [W]e will not abrogate our responsibility to determine whether the right-of-way is suitable for other public purpose ends under 49 U.S.C. 10906.

Ex parte No. 274 (Sub. No. 8), supra, 366 I.C.C. at 890.

The Commission's discharge of its duty under federal law is not incompatible with applicants' interest in the property, even assuming *arguendo* that the State has succeeded to an easement rather than a fee simple interest. The fact that the rails were removed north of chaining station 6512+44 (MP 123.3416) in 1975 almost certainly could not have extinguished the public interest in any portion of the subject

property. Under Vermont law, the mere lapse of time and non-user of railway tracks does not amount to an abandonment of possession. *See Stevens v. MacRae*, 97 Vt. 76, 80, 122 A. 892, 894 (1923). This doctrine is in harmony with the general Vermont law on easements that mere nonuser, no matter how long, will not extinguish an easement. *See, e.g., Timney v. Worden*, 138 Vt. 444, 417 A.2d 923 (1980); *Massuco v. Vermont College Corp.*, 127 Vt. 254, 247 A.2d 63 (1968); *Sabins v. McAllister*, 116 Vt. 301, 76 A.2d 106 (1950). Vermont also follows the general rule that, in the absence of statutory discontinuance proceedings, there can be no abandonment and reversion of a public highway easement, even though the original taking was by condemnation, *Capital Candy Co. v. Savard*, 135 Vt. 14, 16-17, 369 A.2d 1363, ___ (1976), and the same rationale would seem applicable to railroads. Finally, Vermont law expressly precludes any person from acquiring title through adverse possession to any lands within the recorded limits of a highway (Vt. Stat. Ann. tit. 19, § 1452) or a railroad roadway (Vt. Stat. Ann. tit. 30, § 705).

Applicant State of Vermont also submits that movants are in error in asserting that the Commission must ignore statutory changes after August 1899, the date of the condemnation. The railroad industry was the subject of pervasive regulation long before 1899, with the Interstate Commerce Act itself going back to the Act of February 4, 1887. Moreover, the Vermont statute incorporating the Rutland-Canadian Railroad Company and delegating to it the power of eminent domain provided that the act:

shall be deemed and taken to be a public act, and shall be construed favorably and beneficially for all purposes for which the same is intended, and shall, at all times be under the control of the legislature to amend or repeal as the public good may require.

1898 Vt. Acts No. 160, § 10. That such reserved powers

included the right to affect the occurrence of a reverter is indicated by 1900 Vt. Acts No. 153, § 4 (no reverter because of amalgamation of subsidiaries into Rutland Railroad Company). Moreover, the doctrine of alternative public uses of condemned lands had been recognized by the Supreme Court of Vermont many years prior to the 1899 condemnation. *See, e.g., White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590, 594 (1849) (railroad's acquisition of lands originally condemned by turnpike company); *Brainard v. Missisquoi Railroad Co.*, 48 Vt. 107, 114 (1874) (railroad's acquisition of lands originally condemned by plank road company).

In this regard, applicant State of Vermont also would direct the Commission's attention to *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railroad Co.*, 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed. 2d 432 (1985) in which the United States Supreme Court held that "a statute's express reservation of the power to repeal [and] the heavy and longstanding regulation of [the railroad industry] stongly cut [] against any argument that the [prior] statute created binding contractual rights." *Id.*, 84 L.Ed.2d at 448. Hence, the Supreme Court reasoned, a subsequent statutory change requiring private railroads to reimburse Amtrak for pass privileges provided the private railroad's employees and retirees did not violate the Due Process Clause.

Finally, to the degree that delay was occasioned by movants' abortive state court suit (*see Trustees of the Diocese of Vermont v. State of Vermont*, 145 Vt. ___, 496 A.2d 151 [1985]), the consequences of delay should fall squarely on movants. Despite the holding of the Missouri Supreme Court in *Kansas City Area Transportation, etc. v. Ashley*, 555 S.W.2d 9 (1977), *cert. denied*, 434 U.S. 1066 (1978) on lack of subject matter jurisdiction, clearly foreshadowing the 1985 Vermont Supreme Court ruling, movants, presumably for some supposed tactical advantage, chose in 1981 to bring suit in the state courts. The resulting 4-year delay can hardly

be blamed on applicants and should not in any manner be permitted to prejudice the public interest.

Conclusion

For the reasons above set forth, the motion should be DENIED and the Commission should proceed expeditiously under 49 C.F.R. § 1152.50(d)(3).

DATED at Montpelier, Vermont, this 27th day of November, 1985.

JEFFREY L. AMESTOY
ATTORNEY GENERAL

BY: /s/ John K. Dunleavy
JOHN K. DUNLEAVY
ASSISTANT ATTORNEY
GENERAL

[CERTIFICATE OF SERVICE NOT PRINTED]

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-265 (Sub-1X)

STATE OF VERMONT AND
VERMONT RAILWAY, INC.

DISCONTINUANCE OF SERVICE OVER
NORTH BURLINGTON BRANCH IN
CHITTENDEN COUNTY, VERMONT

Verified Notice of Exemption
(49 C.F.R. § 1152.50) (Corrected)

NOW COME the State of Vermont, by and through Attorney General Jeffrey L. Amestoy and Assistant Attorney General John K. Dunleavy, and the Vermont Railway, Inc., by and through John R. Pennington, its President and duly authorized agent, and for their "Verified Notice of Exemption (49 C.F.R. § 1152.50)" state the following:

1. "The notice shall include the proposed consummation date. . . ." (49 C.F.R. § 1150[d][2])

The proposed consummation date is February 15, 1986.

2. "The notice shall include . . . the certification required in [49 C.F.R.] § 1152.50(b). . . ." (49 C.F.R. § 1150[d][2])

Applicants hereby certify that no local traffic has moved over the line for at least two years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court or has been decided in favor of the complainant within the two-year period.¹

3. "The notice shall include . . . the information required in [49 C.F.R.] § 1152.22(a)(1) through (4) and (8) and (e)(5). . . ." (49 C.F.R. § 1150[d][2])

(a) "Exact name of applicant." (49 C.F.R. § 1152.22 [a][1])

The exact names of the applicants are "State of Vermont" and "Vermont Railway, Inc."

(b) "Whether applicant is a common carrier by railroad subject to the Interstate Commerce Act." (49 C.F.R. § 1152.22[a][2])

Applicant State of Vermont is the owner of the subject line of railroad but is not itself a common carrier. Applicant Vermont Railway, Inc. is the lessee and operator of the subject line of railroad and is the common carrier by railroad subject to the Interstate Commerce Act. *See State of Vermont and Vermont Railway, Inc. — Acquisition and*

¹ The history of litigation brought by abutting landowners (who have never claimed to be shippers) is discussed *infra*, paragraph 3(f).

Operation in Vermont, 320 I.C.C. 330 (1963), as modified at 320 I.C.C. 609 (1964).

(c) "Whether the carrier which owns or operates the line of railroad to be abandoned or over which service is to be discontinued is a part of any railroad system." (49 C.F.R. § 1152.22[a][3])

The State of Vermont, owner of the subject line of railroad, also owns the Burlington to Bennington segment of the former Rutland Railway (now leased to the Vermont Railway), the Rutland to Bellows Falls segment of the former Rutland Railway (now leased to the Green Mountain Railroad), the former St. Johnsbury & Lamoille County Railroad, (now leased to the Lamoille Valley Railroad), the former Montpelier & Barre Railroad (now leased to the Washington County Railroad), and a portion of the former Washington branch of the Delaware & Hudson Railway (not presently leased or operated).

The Vermont Railway, Inc., lessee and operator of the subject line of railroad, shares common ownership and management with the Clarendon & Pittsford Railroad.

(d) "Relief sought (abandonment of line or discontinuance of service)." (49 C.F.R. § 1152.22[a][4])

The relief sought by applicants is issuance by the Commission of a certificate of public convenience and necessity permitting discontinuance of service over the North Burlington branch, from chaining station 6489+65 (MP 122.910) north 1.777 miles to chaining station 6583+50 (MP 124.687) (*see* area map, attached hereto as "Exhibit A").

It is the intention of applicants to make the properties involved available to the City of

Burlington for interim use as a bicycle and pedestrian path during the period of time that rail service remains discontinued. The City of Burlington is prepared to assume full responsibility for management of the right-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such right-of-way. (A copy of a June 18, 1985 lease from the State of Vermont, joined by the Vermont Railway, Inc., to the City of Burlington is attached hereto as "Exhibit B".)

(e) "Name, title, and address of representative of applicant to whom correspondence should be sent." (49 C.F.R. § 152.22[a][8])

For applicant State of Vermont:

John K. Dunleavy
Assistant Attorney General
Agency of Transportation
State of Vermont
133 State Street
Montpelier, Vermont 05602
(802) 828-2831

For applicant Vermont Railway, Inc.:

John R. Pennington
President
Vermont Railway, Inc.
One Railway Lane
Burlington, Vermont 05401
(802) 658-2550

(f) "Statement of whether the properties proposed to be abandoned are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction of the title to the property, including any reversionary interest,

which would affect the transfer of title or the use of property for other than rail purposes, this shall be disclosed." (49 C.F.R. § 1152.22[e][5])

Applicants do not propose to abandon any properties, only to discontinue service.

The right-of-way has been used for a number of years by the Burlington Electric Department for electrical transmission lines and it is expected that this use can and should continue uninterrupted during the period of time that rail service may be discontinued. The southern end of the right-of-way touches Burlington's waterfront area. As the right-of-way heads northward, it begins to climb the bluff overlooking Burlington Bay, affording spectacular views of the Adirondack mountains on the far shore of Lake Champlain. The right-of-way bisects the municipally-owned North Beach, passes in a cut through the promontory leading to Lone Rock Point, then emerges on the shore of Appletree Bay, again affording fine views of Lake Champlain the the Adirondacks. The right-of-way bisects municipally-owned Leddy Park before abutting the southern edge of the 1.913 miles (MP 124.687 to MP 126.600) of right-of-way acquired by the City of Burlington directly from the Rutland Railway Corp. on May 24, 1965 and since used as a public bicycle and pedestrian path. Because of its scenic beauty and its contiguity to parks and other publicly owned properties, the subject right-of-way is eminently suitable for interim use as a bicycle and pedestrian path pending restoration or reconstruction for railroad purposes.

An abstract of the parcels constituting the right-of-way is attached hereto as "Exhibit C". None of the instruments referenced in the abstract contains an explicit reversionary clause. It is the

opinion of the undersigned counsel for applicant State of Vermont that the State, as successor in interest to the Rutland-Canadian Railroad Company, has succeeded to a fee simple estate in parcels acquired from the City of Burlington (Lake View Cemetery) (MP 123.064 to MP 123.212), F.M. Manwell (MP 124.0.19 to MP 124.053), the Roman Catholic Diocese of Burlington (MP 124.258 to MP 124.462), and J.S. Derway, Jr. (MP 124.462 to MP 124.687). It is counsel's opinion that use of these parcels is unrestricted (*see Page v. Heineberg*, 40 Vt. 81, 86 [1868]) except for certain deed covenants that may restrict the use of the parcel acquired from the City of Burlington (Lake View Cemetery).

The remaining parcels were acquired by the Rutland-Canadian using the power of eminent domain delegated to it by the Vermont legislature. *See* 1898 Vt. Acts No. 160. It is the opinion of counsel for the applicant State of Vermont that the State's interest in such parcels, whether a fee interest or an easement, is sufficient to encompass use as a corridor for electrical transmission lines, railroading, and other transportation purposes (including a lease for use as a bicycle and pedestrian path), as well as a variety of other public purposes not inconsistent with future transportation uses. *See, e.g.*, 1849 Vt. Acts No. 41, §§ 65-66 (now codified at Vt. Stat. Ann. tit. 30, §§ 709-710) (legislature's retention of right to alter, amend, or repeal railroad statutes not affecting rights or liabilities accrued prior to December 1, 1850); *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590, 594 (1849) (railroad is an "improved highway" and it is proper for the legislature to confer authority on a railroad company to take the property of a turnpike corpora-

tion for the use of the railroad); *Hurd v. Rutland & Burlington Railroad Co.*, 25 Vt. 116, 121 (1853) (railroad had right to exclusive use and possession of condemned land and "[t]hose from whom the land was taken retain no right to its use or occupation. . ."); *Jackson v. Rutland & Burlington Railroad Co.*, 25 Vt. 150, 159 (1853) (the right of the railway to the exclusive occupancy of land taken must be, for all the purposes of the railway, much the same as that of an owner in fee); *Connecticut & Passumpsic Rivers Railroad Co. v. Holton*, 32 Vt. 43, 47 (1859) (railroad's possession of condemned land should be absolute and exclusive against the adjacent land owners, so far as to secure use of the railroad and land for any of the purposes the railroad is intended to accomplish); *West v. Bancroft*, 32 Vt. 367, 371 (1859) (power of the public over highways is not confined to their use for the sole purpose of travel but also embraces many other things that may be done therein for the promotion of the public convenience and health); *Troy & Boston Railroad Co. v. Potter*, 42 Vt. 265, 274 (1869) (railroad has the right to the exclusive occupancy of the land taken and to exclude all concurrent occupancy by the former owners, in any mode and for any purpose); *Brainard v. Missisquoi Railroad Co.*, 48 Vt. 107, 114 (1874) (by acquiring right-of-way of a plank road company across plaintiff's farm, railroad became invested with all the rights of the plank road company and was under no obligation, legal or equitable, to pay the plaintiff therefor a second time); *Grand Trunk Railroad Co. v. Richardson*, 91 U.S. 454, 469 (1875) (railroad could license others to use portions of the land within the line of its roadway where there would be no injury to the public); *Rutland Railroad Co. v. Chaffee*, 72 Vt. 404, 42 A.

984, 407 (1899) (railroad entitled to exclusive occupancy of lands taken and to exclude all concurrent use by the former owners for any purpose); *Drouin v. Boston & Maine Railroad Co.*, 74 Vt. 343, 352, 52 A. 957, 959 (1902) (upon payment of the damages set by the commissioners, railroad company became seised and possessed of the condemned lands for the purposes of its railroad); *Osgood v. Central Vermont Railway Co.*, 77 Vt. 334, 344, 60 A. 137, 140 (1905) (railroad holds its lands to be occupied by itself or by others in the manner that it may consider best fitted to promote or not to interfere with the public use); *Ide v. Boston & Maine Railroad Co.* 83 Vt. 66, 76, 74 A. 401, 403 (1909) (railroad's licensing others to use portions of its roadway is not *ultra vires*); *Bacon v. Boston & Maine Railroad Co.*, 83 Vt. 421, 437, 76 A. 128, 135 (1910) (railroad may lease a portion of its roadway if it does not thereby cripple its efficiency in the discharge of its duties to the public); *Proctor v. Central Vermont Public Service Corp.*, 116 Vt. 431, 434, 77 A.2d 828, 830 (1951) (condemnation by railroad encompasses other public uses, not just railroading); *City of Montpelier v. Bennett*, 119 Vt. 228, 238, 125 A.2d 779, 788 (1956) (municipality properly could devote portion of highway no longer needed for through traffic to parking and other contemporary public needs); *Perrin v. Town of Berlin*, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980) (reduction of public highway to trail status does not involve the acquisition of property rights from abutting land-owners); Vt. Stat. Ann. tit. 30, § 711 (added 1982 Vt. Acts [1981] Adj. Sess.] No. 187, § 1) (retention of publicly owned railroad rights-of-way for purposes not inconsistent with future transportation uses); National Trail System Act, 16 U.S.C.

§ 1247(d), as amended by Act of Mar. 28, 1983, Pub. L. No. 98-11, 97 Stat. 48 (if railroad right-of-way is subject to restoration or reconstruction for railroad purposes, interim use shall not be treated for purposes of any law or rule of law, as an abandonment of the use of such right-of-way for railroad purposes).

In 1981, certain property owners abutting the subject line of railroad between chaining stations 6516+12 (MP 123.411) and 6558+98 (MP 124.223) brought suit against the State of Vermont, the Vermont Railway, Inc., and the City of Burlington in state court, alleging that the interest to which the State had succeeded was a mere easement for the railroad purposes only that had been irretrievably extinguished in late 1975 by the Vermont Railway's removal of most of the rails north of chaining station 6512+44 (MP 123.342). In deference to the Commission's jurisdiction, the state courts have refused to entertain this claim. *Trustees of the Diocese of Vermont v. State of Vermont* 145 Vt. ___, 496, A.2d 151 (1985).

Some of the same abutting property-owners then filed a petition with the Commission, purportedly under 49 U.S.C. § 10505, seeking to have the subject line of railroad completely exempted from the Commission's jurisdiction. *State of Vermont and Vermont Railway, Inc. — Trustees of the Diocese of Vermont, et al. v. State of Vermont, et al.*, Finance Docket No. 30702. (Interstate Commerce Commission, filed July 15, 1985). The same abutters also have brought a 42 U.S.C. § 1983 action against the State, the Railway, and the City, seeking to block any work on the proposed bicycle and pedestrian path pending a decision from the Commission. *Trustees of the Diocese of Vermont*

v. *State of Vermont*, No. 85-265 (D.Vt., filed Oct. 4, 1985.) These cases remain pending.

It is the opinion of counsel for the State that the abutters' claim that they are entitled to recover possession of the condemned lands is without substantial merit.

4. "The notice shall include . . . the level of labor protection. . . ." (49 C.F.R. § 1152.50[d][2])

As there have been no operations over the subject line of railroad for more than two years, formal discontinuance of service will have no effect on railroad employment.

5. "The notice shall include . . . a certificate that the notice requirements of [49 C.F.R.] § 1152.50(d)(1) have been complied with." (49 C.F.R. § 1152.50[d][2])

Applicants hereby certify that on December 3, 1985, at least 10 days prior to filing this notice of exemption with the Commission, they notified in writing the Public Service Commission (or equivalent agency) in the State(s) where the line will be abandoned or the service or trackage rights discontinued and the United States Department of Defense (Military Traffic Management Command). The notice named the railroad, described the line involved, indicated the exemption procedure was used, and included the approximate date that the notice of exemption would be filed with the Commission (*see* letters attached hereto as "Exhibit D", "Exhibit E", and "Exhibit F").

6. As required by 49 C.F.R. § 1105.11, an environmental notice has been served on the designated State agency (*see* letter attached hereto as "Exhibit G").

DATED at Montpelier, Vermont, this 16th day of December, 1985.

STATE OF VERMONT

JEFFREY L. AMESTOY
ATTORNEY GENERAL

BY: /s/ John K. Dunleavy
JOHN K. DUNLEAVY
ASSISTANT ATTORNEY
GENERAL

DATED at Burlington, Vermont, this 16th day of December, 1985.

VERMONT RAILWAY, INC.

BY: JOHN R. PENNINGTON
ITS PRESIDENT AND DULY
AUTHORIZED AGENT

[VERIFICATION, CERTIFICATE OF SERVICE, AND MAP
NOT PRINTED; EXTRACTS FROM LEASE PRINTED AT
OPP APP 17a]

FEDERAL REGISTER

Vol. 51, No. 3 / Monday, January 6, 1986 / Notices

[Docket No. AB-265 (Sub-No.1X);
Financed Docket No. 30702]

State of Vermont and Vermont Railway, Inc: — Discontinuance of Service Exemption in Chittenden County VT — and Trustees of the Diocese of Vermont, et al. v. State of Vermont and Vermont Railway, Inc; Exemption

Applicants, (the State of Vermont, owner of the rail line and the Vermont Railway, Inc., operator of the line), have filed a notice of exemption under 49 CFR 1152, Subpart F — Exempt Abandonments and Discontinuance of Service and Trackage Rights to discontinue service over the North Burlington branch rail line between milepost 124.887 and milepost 122.910, a distance of approximately 1.777 miles, in Chittenden County, VT

Preliminary Matters

Railways Labor Executives' Association (RLEA), by protest filed December 6, 1985, requests that the Commission impose protective labor conditions upon the grant of the exemption. United Transportation Union, by letter filed December 9, 1985, joins in the protest filed by RLEA. In accordance with Commission policy, protective labor conditions will be imposed.

The Trustees of the Diocese of Vermont, Burlington Lodge No. 916, Benevolent and Protective Order of Elks, and J. Paul Preseault and Patricia Preseault (Trustees), filed a motion for summary rejection, and a motion for the consolidation with Finance Docket No. 30702, *Trustees of the Diocese of Vermont, et al. v. State of Vermont and Vermont Railway, Inc.* The State of Vermont replied.

The Trustees urge consolidation because AB-265 (Sub-No. 1X) and Finance Docket No. 30702 relate to the same factual situation and legal issues. The Trustees are correct. Both cases involve the abandonment of the same line and the future use of that line. The proceedings will be consolidation.

The Trustees also argue that the notice of exemption should be rejected because it contains false and misleading information. They state that (1) service has already been discontinued and cannot be discontinued in the future; (2) the notice of exemption procedures do not apply to the discontinuance of service; (3) the opinion of Vermont's counsel as to the state of Vermont's law is not a fact that the Commission should rely on; and (4) legislation occurring after 1975 has no bearing on this line. Vermont replies to each allegation.

The notice will not be rejected. The proposed consummation date of February 15, 1986, is the date on which Vermont intends to formally discontinue service, despite the actual cessation of service in 1975, because of a lack of demand. This was the type of situation for which these procedures were created. *Exemption of Out of Service Rail Lines*, 366 I.C.C., 885, 982 (1983). The Commission expanded the notice of exemption procedures to apply to the discontinuance of service in Ex Parte No. 274 (Sub-No. 8A), *Exemption of Out of Service Lines (Discontinuance of Service and Trackage Rights)* (not printed), served April 20, 1984. The regulations require that Vermont furnish an opinion on any restrictions on title [49 CFR 1152.50(d)(2) and 1152.22(e)(5)]. While Vermont has furnished the opinion required by the regulations, the Commission makes no findings on the validity of that opinion. Finally, the argument that legislation enacted since 1975 cannot affect this proceeding is contrary to the general legal precept that in processing cases the Commission is normally obliged to apply the law currently in effect. *Bradley v. Richmond*

School Board, 416 U.S. 696, 715 (1974). No exceptional circumstances have been presented by the Trustees that require deviation from this rule. Hence, no grounds have been presented warranting rejection of the notice of exemption.

Applicants' Evidence

Applicants have certified: (1) That no local traffic has moved over the line for at least 2 years and that overhead traffic on the line can be rerouted over other lines, and (2) that no formal complaint filed by a user of rail service on the line (or by a State of local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

Applicants do not seek to abandon any properties, only to discontinue service. Because of its scenic beauty and its contiguity to parks and other publicly owned properties, the subject right-of-way is suitable for trail use. The applicants will make the subject right-of-way available for trail use as a bicycle and pedestrian path during the period of time that rail service remains discontinued. The applicants and the City of Burlington, VT have entered into a lease, dated June 18, 1985, whereby the City of Burlington will assume full responsibility for management of the right-of-way and for any legal liability arising out of the transfer or use and for the payment of any and all taxes that may be levied or assessed against the right-of-way. The right-of-way is appropriate for use as a trail and the City of Burlington has the financial capacity to make the commitment required by the *National Trails System Act*, 18 U.S.C. 1247(d)(Trails Act).

Discussion and Conclusions

Pursuant to our jurisdiction under 16 U.S.C. 1247(d) the City of Burlington is willing to take full responsibility for the management of the right-of-way, for any legal liability, and for the payment of taxes on the land. Therefore this line is suitable for trail use under the Trails Act. Since Vermont and the City have entered an agreement so that the City may use the line for interim trail use under 18 U.S.C. 1247(d) no further action by either party is necessary.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co. - Abandonment-Goshen*, 360 I.C.C. 91 (1979).

The exemption will be effective February 5, 1986 (unless stayed pending reconsideration). Petitions to stay must be filed by January 16, 1986, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by January 27, 1986 with:

Office of the Secretary, Case Control Branch,
Interstate Commerce Commission, Washington,
D.C. 20423.

A copy of any petition filed with the Commission must be sent to the applicants' representatives:

John K. Dunleavy, State of Vermont, 133 State
Street, Montpelier, VT 05602,
John R. Pennington, Vermont Railway, Inc., One
Railway Lane, Burlington, VT 05401.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

A notice to the parties will be issued if use of the exemption is further conditioned upon environmental or public use conditions.

Since this notice resolves the issues raised in Finance Docket No. 30702, that proceeding will be dismissed.

It is ordered:

Finance Docket No. 30702 is dismissed.

Decided: January 2, 1986.

By the Commission, Jane F. Mackall, Acting Director,
Office of Proceedings,
James H. Bayne,
Secretary.

[FR. Doc. 86-240 Filed 1-3-86; 8:45 am]

INTERSTATE COMMERCE COMMISSION

I. Docket No. AB-265 (Sub-No. 1X)

STATE OF VERMONT
AND VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VT

II. Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.

v.

STATE OF VERMONT
AND VERMONT RAILWAY, INC.

PETITION FOR STAY OF
DECISION IN CONSOLIDATED CASES

NOW COMES The Trustees of the Diocese of Vermont, *et al.* (hereafter "Trustees"), by and through their attorneys, Gravel and Shea, and hereby petition the Interstate Commerce Commission for an immediate stay of the Decision and Order herein dated January 2, 1986 and served January 6, 1986, until such time as the Commission shall have ruled upon the Trustees' Petition for Reconsideration to be filed on or before January 27, 1986.

As grounds for such a stay and in support of this Petition, the Trustees state as follows:

(1) The forthcoming motion for reconsideration will raise several substantive issues which the Trustees believe must be addressed by the full Commission and/or its designated Administrative Law Judge, including but not limited to the following:

(a) The initial decision now at issue was rendered without any opportunity for the Trustees and their counsel to be heard and to present evidence, and to cross-examine or rebut the evidence of the State of Vermont and Vermont

Railway, Inc. presented only by verified petition. Basic principles of due process and fair play, which are embodied in the Administrative Procedure Act, should allow all parties such an opportunity, rather than having substantive decisions made on a cold, sterile record made up only of what for all practical purposes are the parties' allegations.

(b) Since the exemption granted by the initial decision is only for "interim use" of the subject right-of-way while railroad operations are only "temporarily" discontinued, a key evidentiary finding and issue is necessarily that at some future point railroad operations could or would in fact be reinstated over the subject right-of-way. The Trustees should be permitted a hearing and opportunity to rebut and explore the broad, conclusory statements that some unspecified future resumption of rail service is possible over this line.

(c) The initial decision is based in large part on application of the National Trails Act, 16 U.S.C. §1247(d). However, §1247(d) by its specific terms states that it applies only "in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. §801 *et seq.*]" Section 1247(d) does not in and of itself confer any jurisdiction on the Commission, as the initial decision suggests. Accordingly, since the instant case does not appear to involve any administration of any application or other matter under 45 U.S.C. §801 *et seq.*, section 1247(d) is inapplicable and the initial decision exceeds the limited statutory authority given by Congress.

(d) While certainly the Trustees do not argue with the general proposition that any court or agency applies to a case the law then in effect, here the Trustees did allege "exceptional circumstances" for not doing so here. The Trustees believe that the conduct of the State of Vermont and Vermont Railway, in ignoring their statutory duty for almost ten (10) years to apply formally for abandonment or discontinuance, and then brandishing their own failure to invoke

the Commission's jurisdiction as a sword to prevent a definitive resolution of the state law issues that are at bottom here, is such a circumstance. The initial decision totally ignores and does not address this issue.

(e) Finally, and perhaps most importantly, the specific exemption procedure requires that there be a disclosure of any possible restrictions on title to the right-of-way which may affect its transfer or interim use. 49 CFR §1152.50 (d)(2), *incorporating* 49 CFR §1152.22(e)(5). The Trustees strongly dispute the representation of the State and Vermont Railway that there are no such restrictions or reversionary restraints on title to this right-of-way under state law, and the initial decision expressly declines to address what is for the Trustees the nub of the case. For almost five years the State and Vermont Railway have frustrated and opposed any and all efforts to have that basic question resolved; now the weight of the Commission is to be brought in, without the opportunity for full hearings and complete deliberation, to buttress those attempts.

If the State and Vermont Railway are correct on the state law title questions, as they so loudly trumpet, then they should have nothing to fear from a substantive resolution of those issues. But the course continually pursued by those parties, which will now be abetted by the initial decision, is to ignore the issue entirely and put the cart before the horse. All the Trustees want is their rightful day in court on the underlying state law title issues; if under state law it is determined that there has been no reversion of the right-of-way, *then* the matter will be closed once and for all.

Only if the state law determination is that there was an abandonment and reversion of the right-of-way effective in 1975, will there be any need to address the issues of federal/state pre-emption, exclusive Commission jurisdiction, and unconstitutional taking of property by *ex post facto* legislation which lurk below the surface with the case in its present posture. It is an elemental canon of federal judicial law that

state law issues be resolved *first* so as to avoid if possible pre-emption and constitutional issues; the State and Vermont Railway, and now the initial decision, have reversed that order and will make it necessary to address the latter issues at once.

(2) The Trustees will be irreparably harmed if the initial decision is not stayed pending reconsideration. While resumption of actual construction of the bikepath is probably not imminent due to winter weather, it is conceivable that construction could resume in 6-8 weeks if the decision is not stayed and while reconsideration proceedings are still pending. Obviously any physical change in the right-of-way will be much more costly to remove after-the-fact if it is later determined that the initial decision must be modified or clarified in some crucial respect. Conversely, as the initial decision itself notes, actual traffic on the line ceased more than 10 years ago, so a postponement of the effective date of the exemption could hardly be prejudicial.

CONCLUSION

For all of the reasons stated above, it is respectfully requested that the initial decision herein dated January 2, 1986 be stayed pending reconsideration.

Dated: Burlington, Vermont, January 14, 1986

TRUSTEES OF THE DIOCESE
OF VERMONT, ET AL.

By: /s/ Clarke A. Gravel
Clarke A. Gravel, Esq.

GRAVEL and SHEA
109 South Winooski Avenue
Burlington, VT 05402-1049
(802) 658-0220

[CERTIFICATE OF SERVICE NOT PRINTED]

INTERSTATE COMMERCE COMMISSION

I. Docket No. AB-265 (Sub-No. 1X)

STATE OF VERMONT
AND VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VT

II. Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.

v.

STATE OF VERMONT
AND VERMONT RAILWAY, INC.

PETITION FOR RECONSIDERATION
AND/OR CLARIFICATION OF
DECISION IN CONSOLIDATED CASES

NOW COME The Trustees of the Diocese of Vermont, *et al.* (hereafter "Trustees"), by and through their attorneys, Gravel and Shea, and hereby petition the Interstate Commerce Commission for reconsideration and/or clarification of the Decision Order herein dated January 2, 1986 and served January 6, 1986.

As grounds for such reconsideration or clarification and in support of this Petition, the Trustees state as follows:

(1) The instant cases raise several substantive issues which the Trustees believe must be addressed by the full Commission and/or its designated Administrative Law Judge, including but not limited to the following:

(a) The initial decision now at issue was rendered without any opportunity for the Trustees and their counsel to be heard and to present evidence, and to cross-examine or rebut the evidence of the State of Vermont and Vermont Railway, Inc. which was presented only by verified petition. Basic principles of due process and fair play, which are

embodied in the Administrative Procedure Act, should allow all parties such an opportunity, rather than having substantive decisions made on a cold, sterile record made up only of what for all practical purposes are the parties' allegations. The simple "Notice of Exemption" procedure allowed by 49 CFR §1152.50 is probably adequate in most cases where there is no real objection and no other concerned parties. Here, however, the existence of affected parties raising important questions requires that a more deliberative process be used rather than such a streamlined approach where the decision, as here, is based primarily only on one party's written filing.

(b) Since the exemption granted by the initial decision is only for "interim use" of the subject right-of-way while railroad operations are only "temporarily" discontinued, *cf.* 16 U.S.C. §1647(d), a key evidentiary finding and issue is necessarily that at some future point railroad operations could or would in fact be reinstated over the subject right-of-way. The Trustees should be permitted a hearing and opportunity to rebut and explore the broad, conclusory statements that some unspecified future resumption of rail service if possible over this particular railroad right-of-way. The Trustees believe that given the extensive, physical abandonment of facilities that has already taken place over many years (i.e., removal of bridges, tracks and signals and *permanent* abandonment of connecting rights-of-way to the north), any allegation that railroad service could be resumed or restored over this line is unrealistic and factually unsupported. At the very least, this issue, ignored in the initial Decision, should be addressed by the full Commission or an Administrative Law Judge.

(c) The initial decision is based in large part on application of the National Trails Act, 16 U.S.C. §1247(d). However, §1247(d) by its specific terms states that it applies only "in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. §801 *et seq.*]"

Section 1247(d) does not in and of itself confer any jurisdiction on the Commission, as the initial decision suggests. Accordingly, since the instant case does not appear to involve *any* administration of any application or other matter under 45 U.S.C. §801 *et seq.*, section 1247(d) is inapplicable and the initial decision exceeds the limited statutory authority given by Congress.

(d) While certainly the Trustees do not argue with the general proposition that any court or agency should apply to a case the law then in effect, here the Trustees did allege "exceptional circumstances" for not doing so here. The Trustees believe that the conduct of the State of Vermont and Vermont Railway, in ignoring their statutory duty for almost ten (10) years to apply formally for abandonment or discontinuance, and then brandishing their own failure to invoke the Commission's jurisdiction as a sword to prevent a definitive resolution of the state law issues that are at bottom here, is such a circumstance. The initial decision totally ignores and does not address this issue, which was the crux of the full Commission's decision in *Modern Handcraft, Inc.*, 363 I.C.C. 969 (1981), a point which was raised in the Trustees' filings in these two cases.

(e) Finally, and perhaps most importantly, the specific exemption procedure requires that there be a disclosure of any possible restrictions on title to the right-of-way which may affect its transfer or interim use. 49 CFR §1152.50 (d)(2), *incorporating* 49 CFR §1152.22(e)(5). The Trustees strongly dispute the representation of the State and Vermont Railway that there are no such restrictions or reversionary restraints on title to this right-of-way under state law, and the initial decision expressly declines to address what is for the Trustees the nub of the case. For almost five years the State and Vermont Railway have frustrated and opposed any and all efforts to have that basic question resolved first, by successfully arguing in the Vermont courts that the issue could not be addressed because of the ICC's "primary

jurisdiction" — despite the clear language of this Commission in *Modern Handcraft, supra*, that in such cases its "jurisdiction should *not* be seen as an impediment" to state proceedings involving resolution of right-of-way title questions — and then by having the initial decision here wholly ignore the issue and accept their title "opinion" as certified fact.

If the State and Vermont Railway are correct on the state law title questions, as they so loudly trumpet, then they should have nothing to fear from a substantive resolution of those issues. But the course continually pursued by those parties, which will now be aided and abetted by this Commission if it adopts the initial decision without reconsideration or clarification, is to ignore the issue entirely and put the cart before the horse. All the Trustees want is their rightful day in court on the underlying state law title issues; if under state law it is determined that there has been no reversion of the right-of-way, *then* the matter will be closed once and for all.

In either event, *there can and will be a bikepath* for the citizens of Burlington over the course now planned, because *the Trustees and other adjacent landowners have previously stated their willingness to grant an easement for such use* even if they are determined to have title. Indeed, such an agreement could be reached so that the bikepath is constructed this present season pending proper resolution of the state law title questions, and then any further proceedings to the extent necessary. The ultimate question is not whether there will be a bikepath in furtherance of the policies of the National Trails Act, but simply who owns the ground underneath which the bikepath will run. If railroad operations have indeed been abandoned or discontinued for more than 10 years with no reasonable expectation of resumption, then such a resolution is not inconsistent at all with this Commission's jurisdiction or national transportation policies.

Only if the state law determination is that there was an abandonment and reversion of the right-of-way under state law effective in 1975, will there be any need to address the issues of federal/state pre-emption, exclusive Commission jurisdiction, and unconstitutional taking of property by *ex post facto* legislation which lurk below the surface with the case in its present posture. It is an elemental canon of federal judicial law that state law questions be resolved *first* so as to avoid if possible pre-emption and constitutional issues; the State and Vermont Railway, and now the initial decision, have reversed that natural order and will make it necessary to address the latter issues at once.

Accordingly, the relief sought by the Trustees in the form of reconsideration or clarification is that the full Commission make it clear, in a revised order, that it does not and will not reach the underlying state law title questions and that it exempts or relinquishes its "primary jurisdiction" to the extent necessary to allow the Vermont courts to resolve those fundamental issues. Such a result would be fair and just to all parties; would not work any real hardship on any party, including the citizens of Burlington who would have a completed bikepath in the interim; and would finally give the Trustees the due process and their day in court which they have sought for over five years.

CONCLUSION

For all of the reasons stated above, it is respectfully requested that the initial decision herein dated January 2, 1986 be reconsidered and/or clarified by the full Commission as requested herein.

Dated: Burlington, Vermont
January 24, 1986

TRUSTEES OF THE DIOCESE
OF VERMONT, ET AL.

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INTERSTATE COMMERCE COMMISSION

Docket No. AB-265 (Sub-1X)

STATE OF VERMONT
AND VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VERMONT

Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.

v.

STATE OF VERMONT
AND VERMONT RAILWAY, INC.

REPLY TO
PETITION FOR RECONSIDERATION
AND/OR CLARIFICATION OF
DECISION IN CONSOLIDATED CASES

NOW COMES the State of Vermont, by and through Attorney General Jeffrey L. Amestoy and Assistant Attorney General John K. Dunleavy, and makes the following reply to the January 24, 1986 "Petition for Reconsideration and/or Clarification of Decision in Consolidated Cases":

1. The State of Vermont rejects the contention of the Trustees of the Diocese of Vermont, *et al.* (hereinafter "Trustees") that there remain in the pending cases any substantive issues that require additional fact finding. The

State responds as follows to particular points raised by the Trustees:

(a) The State submits that the parties' filings in both Finance Docket No. 30702 and Docket No. AB-265 (Sub-1X) make it abundantly clear that, while the parties do disagree as to a number of legal issues, there is no genuine issue as to any material fact bearing on matters within the Commission's jurisdiction. The Trustees exaggerate in asserting that the initial decision "is based primarily only on one party's written findings". (Petition at 2.) All parties have had ample opportunity to submit their legal and factual contentions to the Commission and indeed the Trustees have done so.

(b) The State disagrees that under the National Trails System Act, 16 U.S.C. § 1647(d), "a key evidentiary finding and issue is necessarily that at some future point railroad operations could or would in fact be reinstated over the subject right-of-way." It is undisputed that present and immediately foreseeable railroad needs do not require railroad operations over the subject right-of-way. Neither the State of Vermont nor the Vermont Railway, Inc. claim to be able to state that at some date certain — say ten years, six months from now — the tracks will be relaid and railroad service re-established. By the same token, however, it is impossible to say that the subject property never again will be required for future railroad use. In enacting the 1983 amendment to the National Trail Systems Act (now codified at 16 U.S.C. § 1647(d)), the Congress recognized that such uncertainty should not preclude preserving such right-of-way for public use:

Section 208 amends section 8 of the act to encourage the development of additional trails in conjunction with the provision of the Railroad Revitalization and Regulatory Reform Act of 1976. This reflects the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-

way which are not immediately necessary for active service can be utilized for trail purposes. This appears to be true despite the fact that these efforts have also been to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment. If interim use of an established railroad right-of-way consistent with the National Trails System Act is feasible, and if a State, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way that is, to save and hold the railroad harmless from all of these duties and responsibilities — then the route will not be ordered abandoned.

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting

the railroad interests from any liability or responsibility in the interim period. This provision will assist recreation users by providing opportunities for trail use on an interim basis where such situation exists.

H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), *reprinted in* [1983] U.S. Code Cong. & Ad. News 119-20.

The Trustees also assert that the "*permanent* abandonment of connecting rights-of-way to the north" negates any possibility of future re-activation of railroad service. (Petition at 3.) The assertion is either the result of confusion or an attempt at obfuscation. As the parties' prior submissions to the Commission should make clear, the subject right-of-way is the truncated remainder of the former Rutland Railway's main line north through the Lake Champlain Islands. The Vermont Railway never acquired operating authority north of chaining station 6583+50 (MP 124.6875). The line north of the point was authorized to be abandoned by *Rutland Railway Corp. — Abandonment of Entire Line*, 317 I.C.C. 393 (1962) and the tracks located thereon in fact were dismantled and sold for scrap by the Rutland in late 1964 or 1965. The subject line — located entirely *south* of chaining station 6583+50 (MP 124.6875) — retains its connection with the Central Vermont Railway (at chaining station 6488+65 [MP 122.8911]) and, by trackage rights through the Central Vermont's Burlington yard, with the Vermont Railway's Burlington yard and its main line south of Burlington. For a number of years, the subject line was used by the Vermont Railway to serve an industrial siding in North Burlington. It is certainly conceivable (albeit not immediately probable) that the need for such use could arise again. Apart from that, it is possible that future generations might wish to use the subject right-of-way as a corridor for light rail or other local transit purposes or even as a starting point for reconstruction of a through route north to Canada along the old Rutland-Canadian or some other alignment. In

any event, it is quite clear from the legislative history quoted above that Congress did not intend to limit "interim use" to situations where the carrier could articulate a definite plan for resumption of railroad service at a date certain.

(c) The Trustees are correct in stating that the National Trails System Act, 16 U.S.C. § 1647(d) applies to the Interstate Commerce Commission "in administering the Railroad Revitalization and Regulatory Reform Act of 1976". (Petition at 3.) However, the Trustees are in error in asserting that the present cases do not involve any aspect of administering the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (the so-called "4-R Act"). To the contrary, almost all sections of the Interstate Commerce Act pertaining to railroad abandonments and discontinuance of service were amended by Title VIII of the 4-R Act, including the predecessors to 49 U.S.C. §§ 10901 (amended by § 801[a], 90 Stat. 125), 10902 (amended by § 801[a], 90 Stat. 125-27), 10903 (amended by § 801, 90 Stat. 127, 128), 10904 (amended by § 802, 90 Stat. 127, 128), 10905 (amended by § 809[c], 90 Stat. 146), and 10907 (amended by § 802, 90 Stat. 127). *See also* S. Rep. No. 499, 94th Cong., 2d Sess. 105-132, *reprinted in* [1976] U.S. Code Cong. & Ad. News 121-132. As several of these sections deal with preservation of railroad rights-of-way and/or conversion to alternative public uses — precisely what is at issue in the cases now before the Commission — there is absolutely no basis for the Trustees' contention that the initial decision exceeds the statutory authority conferred by the Congress.

(d) The State of Vermont has not concealed from the Commission the fact that the tracks on a portion of the subject line of railroad — between chaining station 6512+44 (MP 123.3416) and chaining station 6583+50 (MP 125.6875) — were taken up in late 1975 because of an acute need for good quality 105-pound Dudley section relay rail on the Vermont Railway south of Burlington. Moreover, the State

concedes that neither it nor the Railway applied for or received permission from the Commission prior to removal of these tracks. However, even assuming *arguendo* that, despite the lack of shipper complaints, the State and/or the Railway may thereby have violated the Interstate Commerce Act, the State fails to follow the logic of the Trustees' argument by which this peccadillo on the part of the State and/or the Railway would justify the Commission's completely turning its back on its statutory mandate to protect the public interest. If the Trustees' point is that the statutes and regulations to be applied by the Commission are less favorable to the Trustees' position than they would have been in 1975, the short answer is that the most significant part of this delay was attributable to the Trustees' own strategy, by which they brought their case first in state courts rather than before the Commission (*see Trustees of the Diocese of Vermont v. State of Vermont*, 145 Vt. ___, 496, A.2d 151 [1985]). If the Trustees' point is that the passage of time between 1975 and the present should serve to vest in them rights that they otherwise would not have, the short answer is that the Trustees have failed to support such point with any statutory or other authority, whether federal or state. The Trustees not only ignore the Commission's primary jurisdiction over railroad abandonments and discontinuances of service but also a number of relevant provisions of state law. In Vermont, the passage of at least 15 years is essential to making out any claim for adverse possession or accrual of prescriptive rights. 12 Vt. Stat. Ann. tit. 12, § 501. Moreover, Vermont, like many jurisdictions, provides that there can be no adverse possession against lands owned by the State or held in trust for the public. *See, e.g.* Vt. Stat. Ann. tit. 12, § 462 (land held for a public, pious, or charitable use); Vt. Stat. Ann. tit. 19, § 1452 (lands within the limits of a highway) Vt. Stat. Ann. tit. 30, § 705 (lands within the recorded limits of a railroad right-of-way). Nor is it likely, even under state property law, that the 1975 removal of the tracks caused the subject property "automati-

cally" to revert to the Trustees. *See, e.g., Capital Candy Co. Inc. v. Savard*, 135 Vt. 14, 16-17, 369 A.2d 1363, __ (1976) (in the absence of statutory discontinuation proceedings, there can be no reversion to abutting landowners of land originally condemned for highway purposes).

(e) The State of Vermont is astounded that the Trustees now assert that the State and the Vermont Railway have failed to comply with the requirement of 49 C.F.R. § 1152.22(e)(5) that they disclose "any restriction of the title to the property, including any reversionary interest, which would affect the transfer of title or the use of the property for other than rail purposes." In Docket No. AB-265 (Sub-1X), the State and the Railway submitted an abstract of the original instruments evidencing the transfers by which the right-of-way was assembled. (Verified Notice of Exemption [49 C.F.R. § 1152.50] [Corrected] Exhibit C [Dec. 16, 1985]). In Docket No. 30702, the Trustees' July 15, 1985 petition was accompanied by certified copies of the August 14, 1899 commissioners' awards to the Vermont Episcopal Institute (predecessor of the Trustees) and the Barker Estate (putative predecessor of the Elks Club). These documents — all of which have been a matter of public record for over 85 years — are devoid of explicit reversionary clauses and (except, possibly, for the City of Burlington/Lake View Cemetery parcel) words of limitation. In their December 15, 1985 exemption notice in Docket No. AB-265 (Sub-1A), the State and the Railway took great pains to trace Vermont law on the extent and adaptability of viatic easements, going all the way back to the seminal case of *White River Turnpike Co. v. Vermont Central Railroad Co.*, 21 Vt. 590 (1849). The State and the Railway hardly can be faulted for having failed to disclose that which does not exist.

Finally, the State submits that the Trustees are in error in contending that a consideration of "the underlying state law title issues" in state court should precede a decision by the Commission. (Petition at 5.) The Vermont Supreme Court

already has determined that the state courts should defer to the Commission. *Trustees of the Diocese of Vermont v. State of Vermont, supra*. Apart from considerations of federalism, however, logic and Vermont case law on highway discontinuations would dictate a similar result. The Vermont Supreme Court has held that completion of the statutory discontinuance proceedings should precede a court's entertaining an abutting landowner's claim to reversion of lands encumbered by a highway easement. See *Capital Candy Co., Inc. v. Savard, supra*. If such proceedings result not in discontinuance but in conversion of the highway to trail status, such conversion has been deemed not to result in the acquisition of property rights from abutting landowners. *Perrin v. Town of Berlin*, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980). *A fortiori*, the holding of the *Perrin* case should apply to property owners abutting a railroad since they, unlike property owners abutting an ordinary public highway (who enjoy implied easement of access), enjoy no right of access to the railroad (which, in term of property law analysis, is much like a limited access highway).

Conclusion

For the reasons above set forth, the initial decision herein, dated January 2, 1986 and reprinted at 51 Fed. Reg. 454-55 (Jan. 6, 1986) should become final.

DATED at Montpelier, Vermont, this 31st day of January, 1986.

STATE OF VERMONT

JEFFREY L. AMESTOY
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BY: /s/ John K. Dunleavy
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BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. AB-265 (Sub-1X)

STATE OF VERMONT
and VERMONT RAILWAY, INC.
DISCONTINUANCE OF SERVICE EXEMPTION
IN CHITTENDEN COUNTY, VERMONT

Finance Docket No. 30702

TRUSTEES OF THE DIOCESE OF VERMONT, ET AL.

v.

STATE OF VERMONT
AND VERMONT RAILWAY, INC.

REPLY OF CITY OF BURLINGTON, VERMONT
TO JANUARY 24, 1986
PETITION FOR RECONSIDERATION
AND/OR CLARIFICATION OF
DECISION IN CONSOLIDATED CASES

NOW COMES the City of Burlington, Vermont, by and through its attorney, John T. Leddy, Esq. of the law firm of McNeil, Murray & Sorrell, Inc., and hereby makes the following reply to the "Petition for Reconsideration and/or Clarification of Decision in Consolidated Cases", dated January 24, 1986, filed herein.

City of Burlington is a lessee of the railroad right-of-way which is the subject matter of the instant Petition, pursuant to

the terms of a certain Lease Agreement, dated June 18, 1985 entered into by the State of Vermont, Vermont Railway, Inc., and the City of Burlington. A copy of said Lease Agreement is attached to the Verified Notice of Exemption, dated November 19, 1985, as Exhibit B, and filed herein.

In rejecting the contention of the Trustees of the Diocese of Vermont, et al. that there remain in either of the instant consolidated cases any substantive issues that require additional fact finding, the City of Burlington joins in and relies upon the points and authorities in the State of Vermont's Reply to Petition for Reconsideration and/or Clarification of Decision in Consolidated Cases, dated January 31, 1986, and filed herein.

WHEREFORE, the City of Burlington maintains that the initial decision rendered by the Commission, dated January 2, 1986, should become final.

Dated at Burlington, Vermont this 4th day of February, 1986.

CITY OF BURLINGTON

By /s/ John T. Leddy
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[CERTIFICATION OF SERVICE NOT PRINTED]

PETITIONER'S BRIEF

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED DECEMBER 23, 1988
CERTIORARI GRANTED APRIL 24, 1989

QUESTIONS PRESENTED

1. Does the 1983 Trails Act Amendment (16 USC §1247(d)) or the Interstate Commerce Commission's interpretation or application of it work a taking of Petitioners' "reversionary" property interest by indefinitely postponing the extinguishment of a railroad right-of-way easement which would have reverted to the Petitioners but for the enactment and enforcement of §1247(d)?
2. Does §1247(d) or the ICC's interpretation and application of it work a physical taking of Petitioners' property by permitting the City of Burlington to possess and occupy the former railroad right-of-way easement for as long as it is used as a bicycle path?
3. Does §1247(d) or the ICC's interpretation and application of it work a regulatory taking of Petitioners' property by denying Petitioners all use and occupation of the property and by placing the property in a Federal "rail bank" for possible future restoration of rail service?
4. Does §1247(d) work a taking of Petitioners' property without just compensation or due process of law in violation of the Fifth Amendment to the United States Constitution?
5. Is §1247(d) an invalid attempted exercise of the Commerce Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption.

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No. 88-1076

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

J. PAUL PRESEALT
and PATRICIA PRESEALT,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
STATE OF VERMONT,
CITY OF BURLINGTON,
and VERMONT RAILWAY, INC.,
Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported as *Preseault v. ICC* (2d Cir 1988) 853 F 2d 145. (Pet App 1)¹

The opinions of the Interstate Commerce Commission (ICC) are not yet reported. The decision on the merits is at JA 55. The opinion on denial of a stay is at Pet App

¹ Documents in the Appendix to the Petition will be cited "Pet App," those in the Brief in Opposition "Opp App," and those in the Joint Appendix "JA."

43. The opinion on denial of reconsideration is at Pet App 47.

JURISDICTION

The decision of the Second Circuit Court of Appeals was entered on August 4, 1988 (Pet App 56) and the timely Petition for Rehearing in Banc was denied on September 28, 1988 (Pet App 57). The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Fifth Amendment, United States Constitution:

"... nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article I, §8:

"The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states . . ."

Trails Act Amendment, 16 USC §1247(d):

"Railroad rights-of-ways. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provision of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future

reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act [16 USC §1241 *et seq.*], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

STATEMENT OF THE CASE

Factual and Procedural History²

Petitioners Paul and Patricia Preseault (the Property Owners) own land on the shore of Lake Champlain in the City of Burlington, Vt., part of which has been subject since the turn of the century to an easement for a railroad right-of-way.

The Rutland-Canadian Railway Co. was incorporated in 1898 and delegated the State's power of eminent domain to acquire a right-of-way for a railroad between the City of Burlington and the town of Alburg. (Opp App 3a) The easement which is the focal point of this litigation was condemned August 14, 1899. (Opp App 7a)³ The railroad began operating in 1901.

In 1962, the ICC authorized the Rutland Railway (successor to the Rutland-Canadian [Opp App 10a]) to abandon all operations in Vermont (*Rutland Railway Corporation — Abandonment of Entire Line* [1962] 317 ICC 393), subject to the acquisition of the line by the State and continued service by its lessee, Vermont

² The ICC determined that there were no material factual disputes and declined to conduct any evidentiary proceedings. (Pet App 49-50) The facts appear in the documents and pleadings presented to the ICC and reproduced in the Appendices.

³ Under settled Vermont law, when the Rutland-Canadian acquired the right-of-way from the Property Owners' predecessors in interest, the railroad obtained only an easement for a railroad right-of-way, which would cease to be a burden on the underlying fee if railroad use were abandoned. (See p 15, fn 14.) In recent state court litigation involving this property, the Vermont Supreme Court agreed that the interest acquired by the Rutland-Canadian was "... an easement for railroad purposes on land owned by predecessors in title to the plaintiffs." (*Trustees of the Diocese of Vermont v. State* [1985] 145 Vt 510, 511)

Railway, Inc. (the Railroad) (*State of Vermont and Vermont Railway, Inc. — Acquisition and Operation in Vermont* [1963] 320 ICC 330).⁴

The State received a quitclaim deed in 1964 from the Rutland Railway which conveyed whatever interest Rutland Railway had, *inter alia*, in the easement as it crossed the Property Owners' land.

The State and the Railroad removed the tracks across the Property Owners' land in late 1975, without ICC approval. That ended all rail operations. (Pet App 50)

In 1981, the Property Owners and several of their neighbors sought to quiet their title to the land formerly burdened by a railroad right-of-way. However, because the Railroad had never sought permission from the ICC to abandon its line, the Vermont Supreme Court held that the state courts lacked jurisdiction until the ICC acted on an abandonment petition. (*Trustees of the Diocese*, 145 Vt 510)

The Property Owners then petitioned the ICC⁵ to declare a *de jure* abandonment of a line which had been *de facto* abandoned a decade earlier. (JA 3)⁶ There-

⁴ The Vermont General Assembly had authorized the public service board, as agent for the State, to acquire Rutland Railway's rights-of-way for "... sale or lease thereof for continued operation of a railroad ..." (Opp App 13a)

⁵ Any interested party, not merely the railroad, may petition for abandonment of a line. (*Thompson v. Texas Mexican R. Co.* [1946] 328 US 134, 145)

⁶ This Court has defined "abandonment" as follows:

"An abandonment 'is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line ...'" (*Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.* [1981] 450 US 311, 314, fn 2; emphasis added.)

after, the State and the Railroad filed a notice of exemption with the ICC, designed to exempt the Railroad from any obligation to provide rail service and to permit "interim" use of the right-of-way by the City of Burlington as a bike path pursuant to 16 USC §1247(d) (the "rails-to-trails" scheme). (JA 43) (Extracts from the lease to the City are at Opp App 17a.) After the proceedings were consolidated, the ICC granted the exemption sought by the State and the Railroad and dismissed the Property Owners' petition. (Pet App 48-49)

The Property Owners sought review in the Second Circuit Court of Appeals, urging that the "rails-to-trails" scheme (and the ICC's application of it) was doubly defective:

- it took the Property Owners' property for public use without compensation, and
- it was an invalid attempted exercise of the Commerce Clause.

The Court of Appeals upheld the statute as a valid Commerce Clause exercise, affirmed the ICC's interpretation of §1247(d), and concluded that the "rails-to-trails" scheme *could never* — as a matter of law — effect a taking of private property. (Pet App 12-13) The latter holding was in conscious conflict (Pet App 12) with the recent decision of the District of Columbia Circuit in *National Wildlife Federation v. ICC* (DC Cir 1988) 850 F 2d 694.⁷ The Property Owners' timely

(ftn. continued)

All papers filed with the ICC by the Respondents show at least an indefinite cessation of transportation service.

⁷ The DC Circuit remanded to the ICC its "rails-to-trails" rules for reconsideration of the ICC's conclusion that trail conversion could never effect a taking of the reversionary rights of the underlying fee owners. On remand, the ICC ducked the issue, refused to change its rules to consider the possibility that trail conversion could result in a taking of reversionary rights, and reiterated its former conclusion.

(continued)

Petition for Rehearing in Bank was denied (Pet App 57), and this Court granted Certiorari.

The "Rails-to-Trails" Scheme

The National Trails System Act (16 USC §1241 *et seq.*) was adopted in 1968 to increase outdoor recreation. That Act was followed by the National Trails System Act Amendments of 1983, whose general thrust was to increase the availability of trails at little or no cost to the government. (See generally Senate Report 98-1; House Report 98-28.) Part of the 1983 Amendments was the so-called "rails-to-trails" scheme.

It had come to Congress's attention that there was a "problem" in utilizing some abandoned railroad rights-of-way for recreational trails because the railroads owned only limited easements in those rights-of-way which terminated when railroad use was abandoned. The "problem" was settled state real property law. The general rule (including the rule in Vermont, as discussed at p 15, fn 14) was that, on abandonment, the railroad's interest would automatically lapse, restoring unburdened title to the underlying property owners. (See generally Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?* [1988] 33 St. Louis U.L.J. 205, 211, 213.) Thus, on abandonment, those railroads which had owned only easements would be unable to convert their former rights-of-way into recreational trails even if the railroads so desired.

(ftn. continued)

(*Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures* [1989] 54 Fed Reg 8011) The ICC's evasion of the DC Circuit's remand order is now on appeal. (Beres v. ICC, DC Cir no 89-1178)

The solution which Congress devised was 16 USC §1247(d). Congress was frank about its intent:

"The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." (House Report 98-28 at 8-9)

The problem with this Congressional solution is that it:

- sought to override and retroactively change state property law;
- ignored settled decisions of this Court that private property cannot be transmogrified by legislative *ipse dixit* into public property without compensation; and
- refused to authorize the expenditure of federal funds for the program except as directly authorized — in advance — in appropriations Acts.

Confusion resulted. The ICC understood that Congress intended for no funds to be expended. (*Rail Abandonments — Use of Rights-of-Way as Trails* [1986] 2 ICC 2d 591, 597 [Trails Rules]) It also understood that Congress intended to eliminate the "problem" caused by the legal doctrine that cessation of rail use works an automatic abandonment of a railroad easement and returns full dominion over the property to the under-

lying property owners. (Trails Rules, 2 ICC 2d at 597) Thus, when it drafted rules to implement the "rails-to-trails" scheme, the ICC concluded that the scheme would not take property from any private property owners and that, in any event, no compensation could be awarded for any "delay" in the ability of property owners to recover full use of the land underlying former railroad rights-of-way. (Trails Rules, 2 ICC 2d at 600)

SUMMARY OF ARGUMENT

A. Overview

The issues before this Court are presented in a legally pristine posture because of their treatment by both the ICC and the Court of Appeals.

The ICC accepted (in a manner similar to the practice on a demurrer or motion to dismiss) that the Property Owners held reversionary rights which would mature on the abandonment of railroad usage of the easement and concluded that those rights were not adversely affected by the "rails-to-trails" conversion. (Pet App 45, 53) Further, the ICC concluded that "... there is no need for cross-examination or other evidentiary proceedings because no material issues of fact are in dispute." (Pet App 49-50)

The Court of Appeals did likewise, concluding that "... that issue of state law does not yet have to be resolved ..." (Pet App 10) "... because we hold that even if they had the reversionary interest they claim, the statute does not effect a 'taking.'" (Pet App 12)

Legally, the Court of Appeals concluded that, regardless of the Property Owners' reversionary interest in the property, the "rails-to-trails" scheme *could not* — under any set of facts — result in a taking for merely delaying (perhaps forever) the enjoyment of that reversion. (Pet

App 12-13)⁸

Thus, what this Court has before it is a case in which the tribunals below accepted that the Property Owners had a right to the property — free and clear of the easement — upon abandonment of railroad usage, and then concluded as a matter of law that §1247(d) could not work a taking of that property interest. (*Compare, e.g.,* the procedural posture of *First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US ___, 96 L Ed 2d 250, 261, 262.)

The importance to all parties of a clear determination of the issues presented in this case cannot be understated. Regardless of one's perception of the propriety of conversion of abandoned railroad rights-of-way to hiking and biking trails, the conflicting decisions of the Second Circuit in this case and the D.C. Circuit in *National Wildlife* leave the program in a limbo which serves no one. Indeed, because of the pending litigation and its conflicting results, the ICC has refused to adopt a position on these issues:

"Given the fact that the compensation issue is still being actively litigated . . . , we have decided not to take any position on the merits of the different interpretations at this time. Nor will we attempt to establish parameters for when a compensable taking might occur." (54 Fed Reg at 8013)

The program and the rights of all interested parties await this Court's decision.

⁸ Please note that the "rails-to-trails" scheme is needed *only* where the railroad owns only an easement subject to reversion. If the railroad owns fee title, the railroad has always been free to sell its right-of-way for trail use. (See Trails Rules, 2 ICC 2d at 599.)

B. The Statute Works a Taking Without Compensation

In *FCC v. Florida Power Corp.* (1987) 480 US 245, 253, this Court held that, because the right of property owners to exclude others from their land was a "most essential"⁹ and "most treasured"¹⁰ aspect of property ownership, the Fifth Amendment stands as a barrier to ". . . an interloper with a government license."

That fundamental protection is at the heart of this case. Congress has purported to grant "a government license" to "interlopers"¹¹ by converting private property into recreational trails. No consent from property owners is sought, required, or otherwise provided for. Compliance with the compensation promise of the Fifth Amendment is forbidden, because the expenditure of *any* money for this conversion is *expressly prohibited* unless money is *expressly* appropriated. None has ever been appropriated in advance. The statute bluntly redefines settled state property law and retroactively applies it to property interests created a century ago.

By its attempted redefinition (and retroactive application) of state easement law, the "rails-to-trails" scheme violates the Taking Clause of the Fifth Amendment: it purports to take property, the unrestricted use of which belongs to the Property Owners on abandonment of

⁹ *Kaiser Aetna v. U.S.* (1979) 444 US 164, 176; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 433; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1011; *Hodel v. Irving* (1987) 481 US ___, 95 L Ed 2d 668, 680; *Nollan v. California Coastal Comm.* (1987) 483 US ___, 97 L Ed 2d 677, 686.

¹⁰ *Loretto*, 458 US at 435.

¹¹ Or, as Professor Tribe colorfully expressed it, ". . . government-invited gatecrashers . . ." (Tribe, *American Constitutional Law* [2d ed 1988] §9-5 at 602)

railroad use of the easement, and permit the former easement holder to transfer the right to use that easement area to others for uses not permitted by the easement.

The "rails-to-trails" scheme was intended to provide additional recreational trails *only* if that could be done through a voluntary effort and without the expenditure of *any* federal funds except those expressly appropriated by Congress — in advance — for the specific purpose. Because Congress expressly restricted the funds which could be spent to those which were specifically appropriated for this purpose, and there has never been any appropriation for converting "rails-to-trails" — and therefore no compensation available for this taking — the statute establishing the "rails-to-trails" scheme is void, as it purports to take private property for public use without compensation. (*Hodel v. Irving* [1987] 95 L Ed 2d 668)

C. The Statute is Invalid Under the Commerce Clause

As a purported regulation of interstate rail commerce, the "rails-to-trails" scheme is a sham. Acknowledging this Court's broad reading of the Commerce Clause, the plain wording of this statute (as well as its legislative history) shows that it has nothing to do with rail commerce; and the Commerce Clause was invoked as a cloak to obscure action which has no valid basis. Trail conversion can be accomplished only *after* the ICC finds that the railroad right-of-way is *not* needed for future railroad use (49 USC §10903), thus demonstrating that preservation of rail corridors was merely a pretext for creating hiking and biking trails where there is no railroad need.

The Court of Appeals misunderstood this fundamental aspect of the statutory scheme when it concluded:

"The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and *if the ICC determines that abandonment is not appropriate*, no reversionary interest can or would vest." (Pet App 12; emphasis added.)

However, as the ICC most recently put it:

"In every Trails Act case, we will *already* have found that the public convenience and necessity *permit abandonment* (or that regulatory approval is not required under 49 U.S.C. 10505)." (54 Fed Reg at 8012, fn 3; emphasis added.)

Moreover, the Court of Appeals used an inappropriately deferential standard of review in examining the basis of this legislation, instead of the scrutiny required by this Court in *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677 for legislation which takes private property.

ARGUMENT

1. WHEN CONGRESS ENACTS A STATUTE WHICH PURPORTS TO UNDO SETTLED STATE PROPERTY LAW, BY AN AFTER- THE-FACT REDEFINITION OF ABANDONMENT OF AN EASEMENT, A FIFTH AMENDMENT TAKING OCCURS

Fundamentally, the "rails-to-trails" scheme is an exercise in definitional gamesmanship. Congress has purported to redefine the law of easements in such a way that the reversionary rights of the underlying fee owners are destroyed. Such attempted definitional transforma-

tion of private into public property runs afoul of this Court's decision in *Ruckelshaus*:

"This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (467 US at 1012 [quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* [1980] 449 US 155, 161])

A. The Definition of Property Rights is a Matter of State Law

Little time need be spent on deciding whether state or federal law determines the definition of "property" which is protected by the Fifth Amendment. Only recently, in examining the impact of federal legislation on property rights, this Court concluded that it must remain:

"... mindful of the basic axiom that '[p]roperty interests are not created by the Constitution. Rather, they are defined by existing rules or understandings that stem from an independent source such as state law.' " (*Ruckelshaus*, 467 US at 1001; emphasis added.)¹²

Perhaps more pertinent is *Kaiser Aetna*, in which the Court repeatedly noted that the property was private under state law (444 US at 166, 167, 179) and thus

¹² Quoting with approval from *Webb's*, 449 US at 161 and *Board of Regents v. Roth* (1972) 408 US 564, 577. See also *PruneYard Shopping Center v. Robins* (1980) 447 US 74, 84, in which the Court said "[n]or as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."

protected from federal interference by the Fifth Amendment (444 US at 180).

As this Court has repeatedly taught, therefore, Vermont law is determinative of the property interests acquired from the Property Owners' predecessors and, perforce, the rights of the Property Owners and the successors to the Rutland-Canadian's easement today.¹³

As discussed above, both the ICC and the Court of Appeals accepted that the Rutland-Canadian acquired only an easement over the subject property for use as a railroad right-of-way, subject to reversion to the Property Owners on cessation of railroad usage. Settled Vermont law confirms the appropriateness of that assumption. (Please recall that, even though it was not litigated in the ICC proceedings, the Vermont Supreme Court noted in the earlier litigation between these same parties that the Rutland-Canadian acquired "... an easement for railroad purposes on land owned by predecessors in title to the plaintiffs." [*Trustees of the Diocese*, 145 Vt at 511]) Vermont law has consistently held that a railroad right-of-way easement exists *only* so long as the railroad uses the easement for railroad purposes. Once railroad use ends, the railroad's interest in the property ends, and the underlying fee owner has unencumbered, fee simple absolute, title.¹⁴

¹³ Both the ICC and this Court have acknowledged this in the railroad context:

"Questions of title to, and disposition of, the [abandoned easement] property are . . . matters subject to State law." (*Hayfield N.R. Co. v. Chicago & N.W. Tr. Co.* [1984] 467 US 622, 634; quoting the ICC.)

¹⁴ *Quimby v. Vermont Cent. R. Co.* (1851) 23 Vt 287, 393 (the words "seized and possessed" in the state's condemnation statute create only an easement for railroad purposes); *Stacy v. Vermont Cent. R. Co.* (1854) 27 Vt 39, 43 (abandonment of right-of-way results in automatic reversion to adjacent landowner); *Hill v.*

(continued)

B. Every State Court Which Has Examined the Railroad Abandonment Issue Has Concluded, on the Facts Present at Bench, that the Railroad has No Interest to be Converted to Recreational Trail Use and No Statute Can Create Such an Interest in Derogation of the Rights of the Underlying Owners

To date, the appellate courts of five states have considered the validity of attempts to transform abandoned railroad easements into recreational trail easements. Under the analysis in all five opinions, the facts at bench demonstrate that there can be no transfer of the former right-of-way for recreational use. All opinions agree that, when a right-of-way is acquired by a method which limits its use, cessation of that use is abandonment of the easement and the easement holder's interest

(ftn. continued)

Western Vt. R. Co. (1859) 32 Vt 68, 77-78 ("It is an easement, a right to use the land in a particular mode for a particular purpose . . . [T]he estate would cease and the land revert, the moment it was put to any other use than the one designated in the charter or statute, by or under which the appropriation was made"); *Rutland Railroad Co. v. Chafee* (1899) 71 Vt 84, 85 ("the right of the plaintiff [railroad] to the land in question is an easement; the only purpose for which it had a right to take it was for a right-of-way"); *Dickerman v. Town of Pittsford* (1951) 116 Vt 563 (railroad easement terminates automatically upon abandonment); *Proctor v. Central Vermont Pub. Services Corp.* (1951) 116 Vt 431, 433-434 ("nonuse for railroad purpose . . . [is] conclusive that premises were abandoned for railroad uses not later than the time the tracks were removed"); *Dessureau v. Maurice Memorials, Inc.* (1974) 132 Vt 350, 351 (actual physical abandonment of railroad use results in reversion of the easement to the adjoining landowners).

in the property ends. (*Pollnow v. State Dept. of Natural Resources* [Wis 1979] 276 NW 2d 738; *Schnabel v. County of DuPage* [Ill App 1981] 428 NE 2d 671; *State by Washington Wildlife Preservation, Inc. v. State* [Minn 1983] 329 NW 2d 543; *McKinley v. Waterloo R. Co.* [Iowa 1985] 368 NW 2d 131; *Lawson v. State* [Wash 1986] 730 P 2d 1308) This analysis was adopted in the federal "rails-to-trails" context in *National Wildlife Federation v. ICC* (DC Cir 1988) 850 F 2d 694.¹⁵

All five of these states have the same common law of easements as Vermont. The only one which held that trail conversion was possible (*Washington Wildlife*) did so because the deeds by which the easement was created did *not* limit the use of the easement to railroad purposes. The contrary treatment by the other four courts, when confronted with facts like those at bench, is instructive.

The most useful of these opinions is the most recent, *Lawson*, in which the Washington Supreme Court was faced with a state statute which purported to accomplish the same result as the Congressional "rails-to-trails" scheme.

The *Lawson* analysis begins with a comment on the use of wordplay instead of analysis, condemning the

¹⁵ As the State acquired the right-of-way at bench by a quitclaim deed, the following comment in *Lawson* seems pertinent:

"We note that, insofar as the present record reveals, the County has only acquired, through a quitclaim deed, whatever interest Burlington Northern held. There is a strong argument to be made that Burlington Northern had no interest to convey to the County: upon abandonment of the right of way the land automatically reverted to the reversionary interest holders." (730 P 2d at 1315)

Cf. *Southland Royalty Co. v. FPC* (5th Cir 1976) 543 F 2d 1134, 1137 [attempted transfer of right to pump natural gas by a party whose right to pump gas was terminating was ineffective].

same type of definitional evasion employed by the ICC and the Court of Appeals here:

"Defendants' second contention is somewhat startling. The argument that the statutes are valid because they do not 'eliminate' plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the statutes, they would not." (730 P 2d at 1313)¹⁶

Lawson then described the common law regarding the creation and abandonment of easements (which is the same as Vermont law), held that the underlying property owners had present, vested property rights which could not be confiscated by statute (730 P 2d at 1314), and concluded that the statute was "... unconstitutional as applied insofar as it purports to authorize King County to acquire without payment of just compensation existing reversionary interests which follow easements for railroad purposes only." (730 P 2d at 1316)¹⁷

¹⁶ Of course, even if only a "temporary taking" occurred by an indefinite "postponement" of the Property Owners' ability to use their property, a Fifth Amendment taking would occur. (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US ___, 96 L Ed 2d 250) See also *National Wildlife*, 850 F 2d at 705 (citing *First English* and quoting *Lawson*).

¹⁷ That Vermont has adopted a similar statute, purporting to authorize trail conversion nearly a century after this easement was acquired (see Opp App 25a), is irrelevant. It can no more transmogrify private property into public property without compensation than the state statutes struck down in the cases discussed above. Indeed, it was precisely because state courts would not permit such statutes to transform abandoned railroad rights-of-way into recreational trails that Congress adopted the "rails-to-trails" scheme. (Trails Rules, 2 ICC 2d at 597)

That conclusion is as appropriate here as it was in each of the state cases to address the issue. The "rails-to-trails" scheme interdicts the Property Owners' ability to use (*Dickman v. Commissioner* [1984] 465 US 330, 336) and dispose of (*Hodel v. Irving* [1987] 481 US ___, 95 L Ed 2d 668) their property.

C. The Right to Exclude Others From One's Property is an Essential Element of Property Ownership

"Property" consists of many things. Indeed, the concept is so complex that this Court has recently adopted the first year property professor's tool of explaining it in terms of a bundle of sticks, concluding that either the taking of an entire "stick" from the "bundle" or the taking of a part of all "sticks" in the "bundle" violates the Taking Clause of the Fifth Amendment.¹⁸

One "stick" which has received special protection from this Court has been the right of the property owner to exclude others from his property. The following formulation from *Kaiser Aetna* has been repeatedly quoted by the Court:

¹⁸ E.g., *Kaiser Aetna v. U.S.* (1979) 444 US 164, 176; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 433, 435; *U.S. v. Security Indus. Bank* (1982) 459 US 70, 76; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1011; *Hodel v. Irving* (1987) 481 US ___, 95 L Ed 2d 668, 680; *Nollan v. California Coastal Comm.* (1987) 483 US ___, 97 L Ed 2d 677, 686.

"... one of the *most essential* sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others." (444 US at 176; emphasis added.)¹⁹

In *Loretto*, the Court amplified this characterization, saying:

"The power to exclude has traditionally been considered one of the *most treasured* strands in an owner's bundle of property rights." (458 US at 435; emphasis added.)

Moreover, the Court has been particularly protective against governmental actions which permit strangers to invade the property of others:

"This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in an *actual physical invasion* of the privately owned marina." (*Kaiser Aetna*, 444 US at 180; emphasis added.)

"Moreover, an owner suffers a *special kind of injury* when a *stranger directly invades* and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively *undisturbed* in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury." (*Loretto*, 458 US at 436; emphasis added.)

¹⁹ This passage is quoted, e.g., in *Loretto*, 458 US at 433, *Ruckelshaus*, 467 US at 1011, *Hodel v. Irving*, 95 L. Ed. 2d at 680, and *Nollan*, 97 L. Ed. 2d at 686.

This Court later explained its *Loretto* ruling as affording protection to a property owner against "an interloper with a government license." (*FCC v. Florida Power Corp.* [1987] 480 US 245, 253) That analogy seems apt here, where the ICC has conceded that "[i]nvariably, interim trail use will conflict with the reversionary rights of adjacent landowners, but that is the very purpose of the Trails Act." (Pet App 53)

D. The Fifth Amendment's Taking Clause Precludes Confiscation of Easements

This Court has also left no doubt that easements are a type of property which cannot be expropriated by governmental action which is not accompanied by compensation:

"And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. [Citations.] Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, *without invoking its eminent domain power and paying just compensation . . .*" (*Kaiser Aetna*, 444 US at 180; emphasis added.)²⁰

²⁰ See also *Nollan*, 97 L. Ed. 2d at 685. That the invasion is accomplished by hikers and bikers, rather than government employees, is irrelevant. (*Loretto*, 458 US at 432, fn 9; *FCC v. Florida Power Corp.*, 480 US at 253; *Tribe, American Constitutional Law* [2d ed 1988] §9-5 at 604-605, fn 33; *Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* [1967] 80 Harv L. Rev 1165, 1184)

E. A Federal Statute Which "Pre-empts" State Property Law and Converts Private Property Into Public Property Without Compensation Violates the Fifth Amendment's Taking Clause

Under the consistent state court decisions discussed earlier, it is clear that state law does not permit the "conversion" of abandoned railroad rights-of-way to hiking and biking trails in derogation of the rights of reversionary property owners. Therefore, in order to effectuate the Congressional goal of expanding the number of recreational trails without having to buy them, the ICC interpreted §1247(d) as being necessarily pre-emptive of that body of law.

"This language, and its legislative history, express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operations, as occurred in *Pollnow and Schnabel, supra*." (Trails Rules, 2 ICC 2d at 600)

However, as the D.C. Circuit concluded in *National Wildlife*, pre-emption, as an abstract concept, is not sufficient to deal with the Constitutional issue in this case:

"Preemption of state law is neither the issue nor the answer, however.

* * *

"The sole issue here in dispute is the ICC determination that reversionary owners whose property interests are defeated by the preemptive effect of the Trails Act Rules upon state

laws are not entitled to compensation." (*National Wildlife*, 850 F 2d at 705)

The determinative issue is not "pre-emption," but the requirements of the Fifth Amendment. For, as this Court has often concluded, the existence of raw governmental power does not validate all exercises of the power. In a similar argument about the pre-emptive effect of federal legislation on state laws, this Court concluded crisply:

"E.P.A. encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a 'pre-emption' of whatever property rights Monsanto may have had in those trade secrets. . . . The Agency argues that the proper functioning of the comprehensive FIFRA registration scheme depends upon its uniform application to all data. Thus, it is said, the Supremacy Clause dictates that the scheme not vary depending on the property law of the state in which the submitter is located . . . This argument proves too much. *If Congress can 'pre-empt' state property law in the manner advocated by the E.P.A., then the Taking Clause has lost all vitality.*" (*Ruckelshaus*, 467 US at 1012; emphasis added.)

Thus, Congressional displacement of settled state property law, through an after-the-fact redefinition of what constitutes abandonment of a railroad right-of-way easement, can only be done in compliance with the strictures of the Fifth Amendment. As shown in the following pages, Congress has failed that task.

2. A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE IS VALID UNDER THE FIFTH AMENDMENT ONLY IF COMPENSATION IS PAID

A. An Uncompensated Taking is Invalid

A taking for public use without compensation violates the Fifth Amendment's Taking Clause:

"... government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English*, 96 L Ed 2d at 264; emphasis added.)

If Congress enacts legislation which takes property and intends to provide no compensation, the statute is invalid. (*Hodel v. Irving*, 95 L Ed 2d 668)

B. An Expressed Congressional Intent to Deny Compensation Invalidates a Statute Which Takes Private Property For Public Use

When the ICC "reconsidered" its "rails-to-trails" rules (after the Second Circuit's decision in this case) on remand from the D.C. Circuit's *National Wildlife* decision, it concluded that it need not be concerned with takings because the Claims Court was available for that purpose. (54 Fed Reg at 8013)

However, whether the remedy for §1247(d)'s taking of the Property Owners' right to possession of the abandoned easement is compensation through the Claims Court or invalidation of the statute because it takes

property without compensation depends on whether Congress intended to preclude compensation. (*Ruckelshaus*, 467 US at 1017) See also *Regional Rail Reorganization Act Cases* (1974) 419 US 102, 126:

"... the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse [to an action for compensation]." (Quoting with approval; emphasis in original.)

Thus, if Congress intended *NOT* to provide compensation, then the validity of any taking effected by the statute must be evaluated under the Fifth Amendment as a taking of private property for public use without compensation.

Sometimes, as in *Ruckelshaus* and the *Regional Rail Reorganization Act Cases*, the courts are left to infer from Congressional silence whether Congress intended that its action should be accompanied by compensation. In each of those cases, this Court concluded that there was no hint that Congress intended *not* to compensate those whose property was taken in the process of implementing the public program. Thus, recourse to the Claims Court for compensation was held appropriate, and the compensation attainable through such proceedings made the statutes valid.

Under other circumstances, this Court has concluded that Congressional silence expressed an intent *not* to pay. In *Hodel v. Irving*, 95 L Ed 2d 668, for example, a statute which required the escheat of miniscule Indian estates did *not* provide for any compensation, rendering recourse to the Claims Court unavailable and the statute invalid.

Thus, central to determining the validity of the statute is whether, when Congress "authorized" trail conversion, it also "authorized" compensation to reversionary property owners. The absolute necessity of such authorization by Congress, to avoid invalidation of the

statute because of the availability of a Claims Court action for compensation, was emphasized in the *Regional Rail Reorganization Act Cases*:

“ ‘The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,’ and hence recovery is not available in the Court of Claims.” (419 US at 127, fn. 16; *see also Ruckelshaus*, 467 US at 1016.)

This case is like *Hodel v. Irving*. Here, both the statute’s language and its history demonstrate that Congress intended *not* to authorize compensated acquisition of trails, and thus *not* to authorize access to the Claims Court. Without the availability of the Claims Court to provide compensation, the taking mandated by the “rails-to-trails” statute is invalid.

i. Both the Words of the Statute and its Legislative History Show that Congress Intended to Exclude Compensation From its “Rails-to-Trails” Scheme

The statute of which the “rails-to-trails” scheme is a part is *explicit* that the only money which is to be expended is money which Congress expressly appropriates for the program in advance:

“Notwithstanding any other provision of this Act, *authority to enter into contracts, and to make payments*, under this Act shall be effective *only* to such extent or in such amounts as are *provided in advance in appropriation Acts*.” (Pub. L. 98-11, §101 [not codified, but reproduced in the notes following 16 USCA

§1249]; emphasis added.)²¹

If there were any lack of clarity in these plain statutory words, the legislative history of the “rails-to-trails” scheme confirms that Congress intended *NOT* to authorize the expenditure of funds to compensate for easements taken.

— *Item*: In House Report No. 98-28, the Committee on Interior and Insular Affairs reported that its review of the series of bills which eventually became enacted as law showed revisions “. . . which eliminated most of the items which could require future Federal expenditures.” (p 2)

— *Item*: House Report No. 98-28 also notes “. . . continuing efforts to encourage the expansion of trail recreation opportunities across the Nation *at low cost*.” (p 3; emphasis added.)

— *Item*: Senate Report No. 98-1, by the Committee on Energy and Natural Resources, confirmed the intention to “. . . eliminate[] most of the items which could require future Federal expenditures.” (p 3)

— *Item*: When the bill was brought to the floor of the House for consideration, Representative Seiberling, the bill’s floor manager, reiterated these budgetary concerns to strictly limit expenditures:

“. . . the committee recommended a revised text which *eliminated* most of the items which would require *future Federal expenditures*. . . . Additional recommendations reflect *continuing efforts* to encourage the expansion of trail recreation opportunities across the Nation *at a*

²¹ Where Congress expressly precludes property acquisitions or expenditures without its express and advance approval, an attempted acquisition without approval is invalid. (*Maia v. U.S.* [DC Cir 1962] 302 F 2d 880)

low cost." (Congressional Record — House at H 1169 [March 15, 1983]; emphasis added.)

— *Item*: When the bill was brought to the floor of the Senate, Senator Domenici spoke in support of passage because the bill did *not* contain, or contemplate use of, eminent domain authority, because he and his constituents felt that "... the Federal Government has acquired too much land from landowners using condemnation procedures that in essence short changed the property rights of the landowners." (Congressional Record — Senate at S 956 [Feb. 3, 1983])

— *Item*: House Report No. 98-28 concludes that the funding required for the Trails Act Amendments is "insignificant" (p 11), a conclusion echoed by the analysis of the Congressional Budget Office, whose report was adopted by the House Committee (pp 11-12).

In light of this expressed Congressional intent to restrict expenditures for the trails system, and the specific limitation in §101 of the Act that *no* expenditures be made without the *express* — advance — authorization of Congress, it seems clear that Congress did not intend its frugal trails program to be undone by compensatory awards in the Claims Court, through expenditures over which Congress would have no direct control.²²

²² See also *Washington State Dept. of Game v. ICC* (9th Cir 1987) 829 F 2d 877; *National Wildlife Federation v. ICC* (DC Cir 1988) 850 F 2d 694; *Connecticut Trust for Historic Preservation v. ICC* (2d Cir 1988) 841 F 2d 479, 482. In each of these cases, the court concluded that the ICC properly interpreted the "rails-to-trails" scheme as being intended by Congress to be entirely voluntary, with no power in the government to compel the creation of a trail. Compelled sale, of course, is what eminent domain is. The absence from the trail program of any authorization for compelled sale demonstrates Congressional intent that no funds be spent except those expressly appropriated in advance.

ii. **Congressional Intent to Preclude Compensation Renders the Statute Invalid and Not Able to Be Legitimated by Recourse to the Claims Court for Compensation**

Strict Congressional fiscal limitations have been repeatedly enforced by this Court. When Congress has restricted funding, this Court has held that actions in excess of the Congressional appropriation are *ultra vires*, not the authorized actions of the government, and thus not cognizable in the Claims Court.

Settled precedent makes it clear that, by the restriction in this statute, Congress did not authorize any takings which would require recourse to the Claims Court for compensation. Thus, the statute must be judged as written — without augmentation by the possibility of Claims Court compensation — and, as it thereby takes property for public use without compensation, it is invalid.

For example, in *Hooe v. U.S.* (1910) 218 US 322, Congress expressly limited the rent appropriation for Civil Service Commission quarters. Not enough money was appropriated for the Commission to continue to pay rent for space which it had been occupying. When the Commission defied Congress and held over, the landlord sued in the Court of Claims to recover the additional rent. This Court held that, as Congress had expressly limited the amount of rent which could be paid, any additional occupation by the Commission — which could not be paid from the express appropriation — was unauthorized by Congress, and no compensation could

be awarded. (218 US at 335)²³

The continuing validity of *Hooe* was confirmed by its 1974 citation with approval in the *Regional Rail Reorganization Act Cases*, 419 US at 127, fn. 16.²⁴

In *Southern Cal. Financial Corp. v. U.S.* (Ct Cl 1980) 634 F 2d 521, the Air Force sought to evade Congressional supervision of its acquisitions by condemning a series of one year leases, rather than acquiring the property in fee. When the property owner tired of these repetitive leasehold condemnations and sued in the Court of Claims to recover for a fee taking, the Court of Claims held that Congress had not authorized such a taking:

"First, it is imperative that, before a compensable taking can be found by the court, there must be some congressional authorization, express or implied, for the particular taking claimed. [Citations.]

* * *

"... to allow judicial compensation for an inverse taking, 'when the only participation by Congress has been to reject the acquisition out

²³ See also *Sutton v. U.S.* (1921) 256 US 575, 579 ["The Secretary of War was, therefore, without power to make a contract binding the government to pay more than the amount appropriated."]; *Leiter v. U.S.* (1926) 271 US 204 ["And since at the time they were made there was no appropriation available for the payment of rent after the first fiscal year, it is clear that in so far as their terms extended beyond that year they were in violation of the express provisions of the Revised Statutes; and, being to that extent executed without authority of law, they created no binding obligation against the United States after the first year."]

²⁴ For discussions of the distinction between authorized (eminent domain) action and unauthorized (tortious) action, see, e.g., *U.S. v. Goltra* (1941) 312 US 203, 208; *Jacobs v. U.S.* (1933) 290 US 13, 18.

of hand, would strike a blow at the power of the purse' and ... that by passing the *Tucker Act*, 'Congress did not strip itself of all control over the obligation of public funds by land takings without condemnation.' [Citation.]" (634 F 2d at 523, 524; emphasis added.)

However, the Court of Claims concluded in *Southern Cal. Financial* that the property owner was not without a remedy: he could seek equitable relief because:

"... whenever there is no authority for a taking or intrusion, the claimant, although unable to obtain compensation, can seek an injunction or a declaratory judgment against the unauthorized governmental activities." (634 F 2d at 526, fn 8)

Such equitable assistance of the courts is what the Property Owners seek here.

As the cases discussed above plainly hold, by expressly restricting the funds available for the trails project — even though the project *in general* has been authorized — Congress did not authorize any takings beyond its appropriations for that project.²⁵ There is neither authorization of compensation nor appropriation for compensation. (Compare, e.g., *Kohl v. U.S.* [1876] 91 US 367; *U.S. v. Kennedy* [9th Cir 1960] 278 F 2d 121, 122-123.) In that light, what the statute purports to authorize is a taking of private property for public use without compensation and without the ability of the Property Owners to obtain compensation in the Claims Court.

²⁵ It is thus settled that actions by the Executive branch of government (here, the ICC) cannot override the wishes of Congress which are expressed in legislation which is within the sole power of Congress to enact. (*Youngstown Sheet & Tube Co. v. Sawyer* [1952] 343 US 579)

In this context, this Court's important 1987 Taking Clause decision in *Hodel v. Irving* (1987) 481 US ___, 95 L Ed 2d 668 points to this case's resolution. In *Hodel v. Irving*, the Court found that Congress intended that *no* compensation be paid to persons affected by the statute's taking of minute decedents' estates. The importance at bench is the reason for this Court's conclusion in *Hodel*. A succinct sentence says it all:

"Congress made no provision for the payment of compensation to the owners of the interests covered by § 207." (95 L Ed 2d at 675-676)

That simple sentence confirmed the Eighth Circuit's earlier analysis:

"By its plain terms — and there is no contention to the contrary — section 2206 does not provide for compensation to the estates of decedents for the land it declares to escheat." (*Irving v. Clark* [8th Cir 1985] 758 F 2d 1260, 1265; *aff'd sub nom. Hodel v. Irving*)

And that is it. Both this Court and the Court of Appeals concluded that a Congressional enactment, concededly adopted to advance a substantial governmental interest, was unconstitutional and invalid because the statute made no compensatory provision for property interests which were taken.

The same is true here. Indeed, Congress was more clear and emphatic in the "rails-to-trails" scheme than in the Indian estate escheat statute invalidated in *Hodel v. Irving*: *no* money was to be spent on the program unless money was *expressly* appropriated in advance for that purpose. (Pub. L. 98-11, §101)²⁶

²⁶ Alongside *Hodel v. Irving*, which invalidated an uncompensated taking, this Court's other 1987 Taking Clause decisions plainly demonstrate that, even though compensation may be an available remedy, injunctive relief may also be appropriate — either separate

(continued)

The "rails-to-trails" scheme is an invalid attempt to take private property for public use without compensation. As Congress forbade any expenditures not expressly authorized in advance, an action in the Claims Court is not available to legitimate this taking by after-the-fact compensation.

3. EVEN RATIONAL STATUTES, ENACTED FOR PROPER LEGISLATIVE PURPOSES, ARE INVALID IF THEY TAKE PRIVATE PROPERTY WITHOUT COMPENSATION

Assuming, *arguendo*, that Congress had a valid goal in mind when it enacted the "rails-to-trails" scheme, neither that validity nor Congress's reasonableness or good intentions would save the statute if it authorizes the taking of private property for public use without compensation.²⁷ As this Court held in *First English*, the Fifth Amendment requires "... compensation in the event of otherwise proper interference amounting to a taking." (96 L Ed 2d at 264; emphasis added; Court's emphasis omitted.)

(ftn. continued)

from or in addition to compensation. That is the clear message of *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US 470, in which the property owners' prayer for injunctive relief was denied, not because such relief *could* not be employed, but on the merits. That is also the clear message of *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677, in which regulatory action which effected an uncompensated taking was enjoined. *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 US ___, 96 L Ed 2d 250, 265, 266-267, 268 demonstrates the coexistence of these remedies.

²⁷ For similar analysis invalidating state action impairing contract rights, see *West Indian Co., Ltd. v. Government of the Virgin Islands* (3d Cir 1988) 844 F 2d 1007, 1021.

Governmental power is not permitted to run roughshod over the Constitutionally protected rights of individuals. That is what this Court was talking about when it concluded in *First English*:

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities* and the Just Compensation Clause of the Fifth Amendment is one of them." (96 L Ed 2d at 268; emphasis added.)

In so holding, *First English* continued a long line of this Court's decisions that the exercise of all governmental power is limited by the Constitution. For example, in *Kaiser Aetna v. U.S.* (1979) 444 US 164, the Army Corps of Engineers thought it would be a good idea to decree that a private marina be open to the public. This Court noted a Constitutional barrier to this exercise of governmental power in furtherance of a perceived public good:

"In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question." (444 US at 174)

Because the commerce power *could not* be used to take private property without compensation, the regulation in *Kaiser Aetna* was invalidated. The commerce

power can be no more expansive here.²⁸

The same issue arose in *U.S. v. Security Industrial Bank* (1982) 459 US 70, where it was urged that it was "rational" for Congress to make bankruptcy legislation retroactive. Again acknowledging the existence of governmental power, this Court still refused to permit it to be used to violate the Constitutional rights of others:

"It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority under Art. I, § 8, cl. 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations. Such agreement does not, however, obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. Thus, however 'rational' the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property

²⁸ See also *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 US 264, in which this Court said the question is "... whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution, or *transgressed affirmative limitations on the exercise of that power* contained in the Fifth and Tenth Amendments." (452 US at 268; emphasis added.) To the same effect is *U.S. v. Chicago, M. St. P. & P. R. Co.* (1931) 282 US 311, 327:

"The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law."

within the prohibition of the Fifth Amendment." (459 US at 74-75)

Because the bankruptcy power *could not* be used to take property without compensation, this Court refused to permit this new provision to be applied retroactively.

Thus, regardless of Congress's good intentions in enacting the "rails-to-trails" scheme, the Fifth Amendment prohibits Congress from achieving its goals by the uncompensated seizure of private property.

4. THE "RAILS-TO-TRAILS" SCHEME IS AN INVALID EXERCISE OF THE COMMERCE POWER

The Court of Appeals engaged in a superficial examination of the validity of the "rails-to-trails" scheme under the Commerce Clause (U.S. Const., Art. 1, §8). The Court of Appeals doubly erred: first, in its determination of the applicable standard of review, and then in its cursory conclusion that the statute passed Constitutional muster.

A. When an Exercise of Governmental Power Results in the Abridgement of Property Rights, the Action is Subject to Close Examination

The Court of Appeals erred from the outset when it determined that its function in reviewing the "rails-to-trails" scheme as an exercise of the Commerce power was the narrow one of determining whether there was "any rational basis" for the action. (Pet App 9)

That standard has *no* application when it is claimed that the governmental action takes private property for public use.

This Court addressed this question in *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677. As the Court there expressed it:

"We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and inagination*. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate State interest. We are inclined to be *particularly careful* about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective*." (97 L Ed 2d at 692; some emphasis added.)

As Professor Daniel Mandelker of Washington University Law School expressed it in a new edition of his nationally recognized text:

"*Nollan's most important holding* is the heightened standard of judicial review it adopted for determining whether a land use regulation substantially advances legitimate governmental interests. This heightened judicial review standard, if the Court meant it to apply to all taking cases, substantially strengthens judicial review of land use regulations under the taking clause." (Mandelker, *Land Use Law* [2d ed 1988] §2.23 at 45; emphasis added.)²⁹

²⁹ The same analysis appears in Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules For Exactions* (continued)

As discussed above, under longstanding Vermont law, abandonment of the easements by the Railroad *automatically* extinguished the easements, restoring full, unfettered use of, and title to, the land to the Property Owners. The "rails-to-trails" scheme was designed to change that aspect of state property law. The ICC, the primary interpreter of the statutes governing its operation, was candidly ingenuous in describing the Congressional purpose behind the statute:

"This language demonstrates that the *main purpose of the amendment* is to *remove reversion as an obstacle* that hinders or prevents the successful conversion of entire linear rights-of-way to *recreation use* when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interests." (Trails Rules, 2 ICC 2d at 597; emphasis added.)

Because of that attempted fundamental change in property law, which requires the Property Owners to relinquish something which was theirs, the *Nollan* standard of review is required.

(ftn. continued)

(1987) 10 Zon. & Plan. L. Rep. 153, 156; Bosselman & Stroud, *The Current Status of Development Exactions* (1987) 14 Fla. Env. & Urb. Issues 8, 9; Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective* (1988) 20 The Urban Lawyer 515, 579-580; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L.J. 335, 338; Lawrence, *Regulatory Takings: Beyond the Balancing Issues* (1988) 20 The Urban Lawyer 389, 424; Marsh & Rosenthal, *At Long Last, The Supreme Court Speaks Out on the "Taking" Issue* (1987) 5 Cal. Real Prop. J. 1; *The Supreme Court, 1986 Term — Leading Cases* (1987) 101 Harv. L. Rev. 119, 247.

Being "particularly careful" in examining the basis of a regulation, as *Nollan* requires, results in substantially less deference to the rationalizations put forth by the government than in pre-*Nollan* times. Regulations which take property can no longer be sustained in court merely because there is *some* rational basis for believing that the challenged action *might* be necessary or useful.

Nollan's analysis makes this clear. There, the government sought to rely on the minimal, rational basis standard of review used by the Court of Appeals here. (See 97 L Ed 2d at 690.) But this Court would have no part of it. Instead, the Court subjected the government's rationales to careful examination, concluding that one justification for the action was "... a made-up purpose of the regulation. ..." (97 L Ed 2d at 690, fn. 6), while others were "... impossible to understand ..." (96 L Ed 2d at 690)

The Court of Appeals' review is not compatible with the *Nollan* standard. Moreover, as the following discussion shows, the "rails-to-trails" scheme is not sustainable even under a "rational basis" standard.

B. The "Rails-to-Trails" Scheme Lacks Sufficient Basis Under the Commerce Clause

The Court of Appeals' analysis of the Commerce Clause issue goes beyond deference. It accepts, in a brief discussion and at face value, the vapid rationalizations put forth in support of the "rails-to-trails" scheme. (Pet App 9-10) That is not adjudication; that is abdication. Under any standard of review, more is required than abject acceptance of presumed Congressional rationality. Otherwise, the general rule would be that there is *no* review of the basis for legislation.

The interstate commerce justification for the statute was said to be the furtherance of the "railbanking" program, *i.e.*, a program to maintain railroad rights-of-way for future use when the present user decides to abandon them.

However, in the context of the "rails-to-trails" scheme, that rationalization is a sham. As noted above, the ICC has candidly acknowledged this, concluding that "... the *main purpose of the amendment is to remove reversion as an obstacle* that hinders or prevents the successful conversion of entire linear rights-of-way to recreation use when the rights-of-way have been operated under easements for railroad purposes." (Trails Rules, 2 ICC 2d at 597; emphasis added.)³⁰

The facts confirm the ICC's conclusion.

— *Item*: Before the ICC can even consider a "rails-to-trails" conversion, it *must* find that the right-of-way is *not* necessary for "... present or future public convenience or necessity ...". (49 USC §10903; emphasis added. See also *Exemption of Out of Service Lines* [1986] 2 ICC 2d 146, 152.) As the ICC most recently put it:

"In every Trails Act case, we will *already* have found that the public convenience and necessity permit abandonment (or that regulatory approval is not required under 49

³⁰ The quoted passage then cites, as illustrative of the reason for the enactment of §1247(d), *not* anything having to do with "railbanking" or anything else to do with reviving railroads for that matter, but to the *Pollnow*, *Schnabel*, and *Washington Wildlife* cases discussed above, which held that state easement law required extinguishment of railroad easements when railroad use ended. (See also Trails Rules, 2 ICC 2d at 600.) That is the problem addressed by §1247(d), not preservation of rail routes.

U.S.C. 10505)." (54 Fed Reg at 8012, fn 3; emphasis added.)

In fact, in employing the exemption procedure in this case (because there had been no rail service for more than two years before the State and the Railroad sought ICC approval of the 1975 *de facto* abandonment), the ICC necessarily found that this particular line "... is not necessary ..." to further congressional rail transportation policies. (49 USC §10505[a][1])

In other words, "railbanking" is permitted only *after* the ICC concludes that "railbanking" is not needed. If "railbanking" were needed, then the ICC *could not* find that the right-of-way is *not* needed for future public convenience and necessity. And yet, an ICC finding of *no* future need must be made before trail use is ever considered. Thus the governing statute and the ICC's rules confirm that the actual purpose of §1247(d) is the creation of hiking and biking trails, not the preservation of needed rail rights-of-way.

— *Item*: The effectuation of this supposed "national interstate commerce" policy was left *not* to the ICC or any national governmental body, but to voluntary agreement³¹ between railroads and either private trail operators or local government agencies.³² Absent such

³¹ The "rails-to-trails" scheme has been repeatedly held to be a voluntary, rather than a mandatory, program. (*Washington State Dept. of Game v. ICC* [9th Cir 1987] 829 F 2d 877; *National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694; *Connecticut Trust for Historic Preservation v. ICC* [2d Cir 1988] 841 F 2d 479)

³² The ICC cannot compel trail conversion if no trail group expresses interest (*e.g.*, *Chicago and North Western Transp. Co. — Abandonment and Discontinuance of Trackage Rights* [1988] ICC Docket No. AB-1 [Sub-no. 219][1988 ICC Lexis 365]) or if the railroad declines any trail conversion (*e.g.*, *Chicago and North Western Transp. Co. — Abandonment* [1988] ICC Docket No. AB-1 [Sub-No. 215][1989 ICC Lexis 23]; *Missouri Pacific Railroad Co.*

(continued)

agreements, the so-called "national policy" comes to naught. Moreover, if the trail operator becomes disenchanted with its task, it may abandon the trail at will, with scarcely a "by your leave" to the ICC. (49 CFR §1152.29[C][2]) Whether there is any "railbanking" at all is thus left to the whim of railroads and trail operators. This is a recreation measure, not a railroad measure. When Congress wishes to address national railroad problems, it is much more direct.

— *Item*: Consideration of §1247(d) before its passage was *not* in Congressional Committees concerned with (and knowledgeable about) transportation, but in the Senate Energy and Natural Resources Committee and the House Interior and Insular Affairs Committee. Plainly, the regulation of rail commerce was not prominent in the minds of those who enacted the statute.

— *Item*: In a related manner, the "rails-to-trails" scheme does *not* appear in the *Transportation* Title of the U.S. Code, but in the *Conservation* Title, as part of the National Trails System Act. If the true purpose of §1247(d) had anything to do with the future use of railroad rights-of-way by railroads, the statute would have been codified accordingly. In fact, Congress put the statute right where it intended, a placement which belies its railroad regulation rationalization.

— *Item*: No finding that a particular right-of-way is even suitable (let alone needed) for "railbanking" is necessary before the ICC authorizes conversion to recreational trail use. (49 CFR §1152.29)³³ This

(ftn. continued)

— *Abandonment* [1988] ICC Docket No. AB-3 [Sub-No. 57][1988 ICC Lexis 384]).

³³ As the ICC noted in this case, "... such a finding is not statutorily required and was not made in this proceeding." (Pet App 44)

caused the D.C. Circuit evident concern. (See *National Wildlife*, 850 F 2d at 707, 708.)

The Court of Appeals refused to consider the *actual* rationality of this scheme, opting for an *assumed* rationality. *Nollan* shows the inappropriateness of that mode of review.

The "rails-to-trails" scheme is a transparent attempt to alchemize private property into public hiking and biking trails at no cost to the public, but at substantial loss to individual property owners. The "rails-to-trails" scheme is not justified as railroad regulation under the Commerce Clause.³⁴

5. THIS CASE IS ABOUT ENDS AND MEANS

The Court of Appeals concluded that, because the goal sought by Congress was good, the means chosen to effectuate it were ipso facto appropriate. The Court of Appeals praised the "efficient" means chosen by Congress to create recreational trails. (Pet App 10)

But efficiency is not the issue. Constitutionality is the issue.³⁵ This Court made this plain in *First English* (96 L Ed 2d at 268), *Nollan* (97 L Ed 2d at 692), and *Hodel v. Irving* (95 L Ed 2d 668). Thus, the question is not whether it is good to enable people to utilize bike or hiking trails. The question is *how* can government, in our Constitutional system, go about achieving its desire?

³⁴ The analysis in this section also demonstrates that the "rails-to-trails" scheme is a denial of substantive due process as applied to the Property Owners, as it is arbitrary, capricious, and lacking in a rational basis. (See *Littlefield v. City of Afton* [8th Cir 1986] 785 F 2d 596.)

³⁵ Mussolini is said to have made the trains run on time, but his methods left something to be desired in a Constitutional system like ours.

This Court has often cautioned that the means chosen by government officials to meet perceived public needs must be carefully scrutinized for Constitutional conformity:

"[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." (*Stanley v. Illinois* [1972] 405 US 645, 656; footnote omitted)³⁶

It is also in this context that the line of cases headed by *Kaiser Aetna v. U.S.* (1979) 444 US 164, 172 and *U.S. v. Security Industrial Bank* (1982) 459 US 70, 74-75 must be analyzed. Those cases establish that Congressional power (be it the Commerce Power [*Kaiser Aetna*], the Bankruptcy Power [*Security Industrial*], or some other power) cannot be exercised in such a way that the Fifth Amendment's Taking Clause is violated.

The unifying thread in these decisions is that the Fifth Amendment rights of property owners cannot be violated in a governmental attempt at efficiency. As this Court has repeatedly held, the purpose of the Just Compensation Clause is "... to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*First English*, 96 L Ed 2d at 266 [terming the precept

³⁶ See also *Shelton v. Tucker* (1960) 364 US 479, 488; *McNabb v. U.S.* (1943) 318 US 332, 347; *Pennsylvania Coal Co. v. Mahon* (1922) 260 US 393, 416; *Olmstead v. U.S.* (1928) 277 US 438, 479 (Brandeis, J., dissenting).

"axiomatic"] If the "rails-to-trails" program is important to Congress, then Congress needs to be told that reversionary property owners cannot be saddled with the cost of the program by precluding the expenditure of any funds to acquire their interests.

Action which attempts to take private property for public use without compensation is invalid.

CONCLUSION

Justice Holmes had a way with words. A passage recently reiterated by this Court has great moment for this case:

"As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' " (*First English*, 96 L Ed 2d at 268; quoting *Pennsylvania Coal Co. v. Mahon* [1922] 260 US 393)

As we celebrate the Constitution's Bicentennial, Congress apparently needs to be reminded of that elementary precept. No one need question the good intentions of Congress when it enacted the "rails-to-trails" scheme. Nor need one question the benefits to the public of increased outdoor recreation. That is not the question here. The question, as so often in Constitutional litigation, is not ends, but means. Congress chose a proscribed means to achieve its goal: it sought to do it on the cheap, by definitional game playing, rather than straightforwardly, by buying the necessary property.

Congress made it abundantly clear that it did not intend to spend any money to acquire the trail easements at bench. It appropriated no money for them and it

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proscribed any acquisition for which an appropriation was not made in advance.

As mediaeval alchemists could not transform lead into gold or sows' ears into silk purses, so Congress, by a stroke of the pen, cannot transform private land into recreational trails without complying with the Fifth Amendment's clear command to pay just compensation. Without Fifth Amendment compliance, the "rails-to-trails" scheme cannot pass Constitutional muster. The scheme is void.

The Property Owners pray that this Court so hold and that the judgment be reversed.

Respectfully submitted,

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No. 88-1076

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss:

Esiquia C. Gonzales being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On June 6, 1989, I served the within BRIEF FOR PETITIONERS and JOINT APPENDIX (under separate cover) on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

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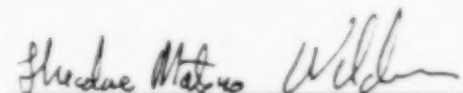
That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioners herein, and that to the best of my knowledge all persons required to be served in said action have been served.


Esiquia C. Gonzales

On June 6, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia C. Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.




Notary Public in and for
said County and State

RESPONDENT'S

BRIEF

(14)
No. 88-1076

Supreme Court, U.S.
FILED

JUL 28 1989

~~JOSEPH P. ANIOL, JR.~~
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

J. PAUL PRESEALT AND PATRICIA PRESEALT,
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INTERSTATE COMMERCE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

Petitioners claim to own a reversionary interest in a portion of a right-of-way used by the Vermont Railway, Inc. The questions are:

1. Whether an order of the Interstate Commerce Commission that allows the City of Burlington to use that right-of-way as a nature trail is invalid as an unconstitutional taking of petitioners' property.

2. Whether the statute authorizing the use of the right-of-way as a nature trail is unconstitutional because it exceeds Congress's authority under the Commerce Clause of the Constitution.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 853 F.2d 145. The final decision of the Interstate Commerce Commission denying reconsideration (Pet. App. 47-54) is reported at 3 I.C.C.2d 903.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56) was entered on August 4, 1988. A petition for rehearing was denied on September 28, 1988. Pet. App. 57. The petition for a writ of certiorari was filed on December 27, 1988, and certiorari was granted on April 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interplay between the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and the National Trails System Act, 16 U.S.C. 1241 *et seq.* Under the Interstate Commerce Act, a rail carrier generally must continue to offer service over its lines to shippers unless it first obtains authority from the Interstate Commerce Commission (ICC or Commission) to abandon the lines. See 49 U.S.C. 10903 *et seq.* (1982 & Supp. V 1987). In deciding whether to authorize an abandonment, the Commission must determine whether "the present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. 10903(a). The ICC's authority over rail line abandonment is exclusive and plenary. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981).

The National Trails System Act (Trails Act) was enacted in 1968 to establish a nationwide system of nature trails.¹ In 1983, Congress amended the Trails Act (the 1983 Amendments) to advance its declared policies of promoting nature trails and preserving unused railroad rights-of-way for possible future use by railroads. See National Trails Systems Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48. In the 1983 Amendments, Congress added Section 8(d) to the Trails Act (16 U.S.C. 1247(d) (Supp. V 1987)), which provides that rights-of-way

¹ The purpose of the Trails Act is "to provide for the ever-increasing outdoor recreation needs of an expanding population and . . . to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." 16 U.S.C. 1241(a). The "National System of Trails" includes national recreation trails, national scenic trails, national historic trails, and connecting or side trails. 16 U.S.C. 1242(a) (1982 & Supp. V 1987).

that might otherwise be abandoned may be preserved and used on an interim basis as nature trails.² Section 8(d) states that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." Under Section 8(d), a local government or private organization must agree to maintain the right-of-way for possible future railroad use. Section 8(d) thereby relieves the railroad of financial responsibility for the right-of-way until the railroad reactivates rail service over the line.³

The passage of Section 8(d) followed a history of congressional concern about the loss of rail corridors. The Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, was enacted in response to the decline of railroads

² 16 U.S.C. 1247(e) (Supp. V 1987) provides that these interim trails "may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior."

³ In April 1986, the Interstate Commerce Commission issued final regulations implementing Section 8(d). *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 628 (1986); 49 C.F.R. 1152.29. Under those regulations, the Commission issues to the petitioning railroad a "Certificate of Interim Trail Use or Abandonment" (CITU) or, in some cases, a "Notice of Interim Trail Use" (NITU). The CITU or NITU provides a 180-day period during which the railroad may negotiate with parties that are interested in interim trail use. In the meantime, the railroad may discontinue service, cancel tariffs, and salvage its track and other equipment. If an agreement with a trail user is negotiated, interim trail use is thereby authorized. Upon termination of the trail use arrangement, the parties must file a petition to reopen the abandonment proceeding in order for the Commission to issue a full certificate, or notice, of abandonment to the railroad. If no trail use agreement is reached, the CITU or NITU automatically converts into an effective certificate (or notice) of abandonment, which permits the railroad to abandon the line immediately.

in the United States after World War II. One goal of that legislation was "the preservation * * * of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located * * *." 45 U.S.C. 716(a). Later, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31, to further address the continuing decline of the railroad industry. The 4R Act directed the Secretary of Transportation to study the possibility of "establishing a rail bank consisting of selected * * * rights-of-way, as a means of assuring their availability for potential railroad use in the future * * *" (§ 809(a), 90 Stat. 144, 145). After those attempts to preserve rail corridors met with only minor success, Congress enacted Section 8(d) of the Trails Act. See H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983).

2. Petitioners are Vermont landowners who claim to hold a reversionary interest in a railroad right-of-way adjacent to their land. Until 1975, Vermont Railway, Inc., operated rail service over that line under a lease from the State of Vermont. Pet. App. 3-4. The State claims that it owns the right-of-way in fee simple (*id.* at 4). Petitioners, however, contend that they own title to the land, subject only to an easement for railroad purposes. Accordingly, after active rail operations had ceased, petitioners brought a quiet-title action in state court. The Supreme Court of Vermont dismissed that action on the ground that the ICC had exclusive jurisdiction over the right-of-way because it had not authorized the abandonment of the line. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985).

Petitioners then filed with the ICC a petition seeking a certificate of abandonment for the rail line. While that

petition was pending, Vermont Railway and the State of Vermont (Vermont) filed with the Commission a request to be relieved of their common carrier obligation (J.A. 43-53). Vermont informed the Commission of its intent to enter into an interim trail use agreement with the City of Burlington under Section 8(d) of the Trails Act. The ICC granted Vermont's request to be relieved of its obligation to provide rail service (J.A. 55-59).⁴ The Commission also dismissed petitioners' request for a ruling that Vermont and Vermont Railway had abandoned the line, de facto, in 1975 (Pet. App. 49).

Petitioners then filed a petition for reconsideration that raised a number of issues under the Trails Act. The Commission denied that petition (Pet. App. 47-54). The ICC ruled that the agreement between Vermont (the railroad carrier) and the City of Burlington (the proposed trail user) satisfied the requirements of the Trails Act (*id.* at 50). In particular, the Commission noted that the "right-of-way is available for restoration for railroad purposes, as required by the Trails Act" (*ibid.*).

3. Petitioners sought review of the Commission's final order in the Second Circuit. Petitioners argued that Section 8(d) of the Trails Act is unconstitutional on its face because it is not a valid exercise of Congress's Commerce Clause power and because it takes private property without just compensation. The court of appeals upheld the Commission's order. In rejecting the Commerce Clause challenge, the court stated: "The challenged section of the Trails Act serves two purposes: (1) preserving rail corridors for future railroad use and (2) permitting public

⁴ Because the Commission's Trails Act Rules (see note 3, *supra*) had not yet been promulgated, the Commission did not issue a Certificate or Notice of Interim Trail Use.

recreational use of trails. Both purposes are legitimate congressional goals under the commerce clause." Pet. App. 9. The court then observed that Section 8(d) is a "remarkably efficient and sensible way to achieve both goals." Pet. App. 10.

The court of appeals also rejected (Pet. App. 10-13) petitioners' assertion that Section 8(d) is unconstitutional on its face because it effects a taking of private property without just compensation. The court noted that petitioners purport to hold a reversionary interest in the right-of-way at issue (Pet. App. 12). The court ruled, however, that "[t]he ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railroad carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest" (*ibid.*). Here, the court observed, the ICC has determined that the right-of-way may not be abandoned because it should be retained for possible "future railroad use" (*ibid.*). Accordingly, the court of appeals concluded that the ICC's decision implementing Section 8(d) of the Trails Act did not effect a taking any more than would a Commission order requiring a railroad to continue to provide railroad service over a particular line (Pet. App. 12).

SUMMARY OF ARGUMENT

1. a. Petitioners contend that the Commission's order results in an unconstitutional taking of their property. The Fifth Amendment, however, does not prohibit the government from taking property; it proscribes only takings without just compensation. Accordingly, the Commission's order is not unconstitutional if petitioners have an available process whereby they can seek compensation.

See *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

The Tucker Act gives petitioners a remedy for seeking just compensation. It allows a person to recover just compensation in the United States Claims Court for a taking of private property by the government. Accordingly, the Commission's order is constitutional whether or not it results in a taking of petitioners' property.

b. Contrary to petitioners' contention, Congress did not withdraw the Tucker Act remedy when it adopted Section 8(d) of the Trails Act. This Court has held that the Tucker Act is available unless Congress states its "unambiguous intention to withdraw the Tucker Act remedy." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984). See *Regional Rail Reorganization Cases*, 419 U.S. 102 (1974).

Here, the 1983 Amendments and their legislative history show that Congress was completely silent on the Tucker Act remedy when it adopted Section 8(d). To be sure, Congress expressed its concern that the 1983 Amendments operate at low cost. But that expression is not inconsistent with the availability of compensation for the limited takings that might result from Section 8(d) and is therefore insufficient to show an unambiguous intention to withdraw the Tucker Act remedy. In addition, Congress stated that payments under the 1983 Amendments must be authorized by appropriations Acts. That requirement, however, is fully consistent with the Tucker Act remedy. Payments for a taking are made under the Fifth Amendment and the Tucker Act, not under the 1983 Amendments—and, in any event, would be made from the Judgment Fund, which is an appropriated fund, 31 U.S.C. 1304(a).

c. Even if Congress did intend to withdraw the Tucker Act remedy, Section 8(d) would not be unconstitutional on

its face. Rather, Section 8(d) would be unconstitutional only in those cases where its application would result in an uncompensated taking. It is disputed whether the Commission's order under Section 8(d) would effect a taking of any property interest of petitioners in this case. Accordingly, if the Court were to hold that Congress repealed the Tucker Act remedy, this case should be remanded to the ICC to determine, in the first instance, whether the application of Section 8(d) would effect a taking of petitioners' property.

2. Section 8(d) is a valid exercise of Congress's power under the Commerce Clause. Section 8(d) was designed to advance two legitimate goals: (a) the creation of new recreational trails, and (b) the preservation of rail corridors for the possible future reactivation of rail service. This Court's inquiry under the Commerce Clause is limited to whether Congress could rationally believe that Section 8(d) would advance those goals. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

There is no doubt that Section 8(d) reasonably advances both goals. Indeed, petitioners do not even dispute that Section 8(d) is a sensible way to create new recreational trails. And contrary to petitioners' contention, Section 8(d) also serves to protect the nation's rail corridors. Congress adopted Section 8(d) after its previous attempts to preserve railroad right-of-way had met with limited success. Section 8(d) furthers the policy of preserving rail corridors by providing that a trail user must assume the responsibility for managing the property and paying taxes on the corridor. In that way, Section 8(d) allows the route to remain intact and available for future rail use if economic conditions change and railroad service again becomes economically viable.

ARGUMENT

I. THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IS NOT AN UNCONSTITUTIONAL TAKING OF PETITIONERS' CLAIMED PROPERTY

A. A Taking Of Property Is Constitutional If Just Compensation Is Available

This is an action brought under 28 U.S.C. 2342 (1982 & Supp. V 1987) for judicial review of a final order of the ICC. Petitioners do not contend that the Commission violated any statutory duty. Rather they contend that the Commission's order results in an unconstitutional taking of petitioners' property. But the Commission's order is constitutionally valid whether or not Section 8(d) results in a taking in this case. As this Court has repeatedly held, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In *Williamson County Planning Comm'n*, 473 U.S. at 194-195, the Court stated: "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking" (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984)). See also *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 94 n.39 (1978).

The Tucker Act (28 U.S.C. 1491) provides such a process for seeking just compensation. It allows a person to recover just compensation in the United States Claims Court for a taking of private property by the federal

government.⁵ See *United States v. Causby*, 328 U.S. 256, 267 (1946). Accordingly, this Court has "held that taking claims against the Federal Government are premature until the property owner has availed himself of the process provided by the Tucker Act." *Williamson County Planning Comm'n*, 473 U.S. at 195.

Because petitioners have not pursued any claim for compensation under the Tucker Act, their Fifth Amendment challenge to the Commission's order is "premature." *Williamson County Planning Comm'n*, 473 U.S. at 195. The Commission's application of Section 8(d) of the Trails Act in this case did not effect an unconstitutional taking even if petitioners' claimed reversionary interest was "taken" within the meaning of the Fifth Amendment.

B. Congress Has Not Repealed Petitioners' Tucker Act Remedy

Petitioners contend (Br. 24-28) that Congress, in adopting the 1983 Amendments, repealed the Tucker Act's grant of jurisdiction to adjudicate takings claims involving Section 8(d) of the Trails Act. That contention cannot withstand examination of the 1983 Amendments in light of the governing principles announced by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (*Rail Act Cases*), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

⁵ The Tucker Act provides in relevant part that:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States * * *.

Compensation may also be sought in the district court for claims not exceeding \$10,000. 28 U.S.C. 1346(a)(2). Judgments are paid from the general appropriation in the Judgment Fund, 31 U.S.C. 1304.

1. a. The *Rail Act Cases* involved challenges to the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, which Congress enacted to address a rail transportation crisis brought on by the reorganization of railroads under the Bankruptcy Act. Congress attempted to resolve the crisis through "reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit corporation [Conrail]." 419 U.S. at 109. The Act required that a new government corporation, the United States Railway Association, prepare a "Final System Plan" for restructuring the railroads into a "financially self-sustaining rail service system." 419 U.S. at 111. Under the terms of the Rail Act, however, the subject railroads were required to continue service until the Final System Plan became effective.

Creditors of Penn Central challenged the constitutionality of the Rail Act. They claimed that continued interim service would cause erosion of Penn Central's estate, and would result in an unconstitutional taking despite the fact that the Rail Act provided some compensation to Penn Central's creditors. The district court agreed and enjoined operation of the statute. *Connecticut General Ins. Corp. v. United States Railway Ass'n*, 383 F. Supp. 510 (E.D. Pa. 1974). That court based its holding on its conclusion that Congress had withdrawn the Tucker Act remedy by providing limited compensation under the Rail Act and by expressing concern that the federal treasury should not be overburdened by payments made under the Rail Act. The court cited legislative history showing Congress's fiscal concerns.⁶ And the district court noted that

⁶ The court noted (383 F. Supp. at 528) that "Senator Vance Hartke * * * observed that if Congress did not act by providing the creditors with stock in Conrail, 'there is a distinct possibility . . . that a number of these people could make a claim against the Government which

the appropriations provisions in the Act "place an express ceiling on expenditures." *Id.* at 529. Accordingly, the court was "persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act." *Id.* at 528-529.

This Court reversed. It noted that "[t]he question * * * is whether Congress has in the Rail Act *withdrawn* the Tucker Act grant of jurisdiction" (419 U.S. at 126 (emphasis in original)) and found that "Congress gave no thought to consideration of withdrawal of the Tucker Act remedy." *Id.* at 129. The Court reviewed the legislative history cited by the district court and found that Congress was silent on the matter of the Tucker Act. *Ibid.*⁷ The Court ruled, therefore, that the legislative history was insufficient to signify Congress's intent to withdraw the Tucker Act remedy.

The Court recognized that the Rail Act set forth "[m]aximum" funding authorizations (419 U.S. at 127-128), but the Court held that those limits were not an unambiguous

could be sustained in the Court of Claims.' " The court also cited the following colloquy (*ibid.* (emphasis added)):

Mr. [Dan] Kuykendall: " * * * There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.

"Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?"

Mr. [Brock] Adams: "Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress * * *."

⁷ The Court noted, for example, that the House colloquy relied upon by the District Court "does not even concern the withdrawal of Court of Claims jurisdiction." 419 U.S. at 131-132.

repeal of the Tucker Act remedy. The Court reasoned that the maximum limits on funding might imply a limitation on the Tucker Act remedy or might "equally support the inference that Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims" (*id.* at 128). The Court concluded:

In sum, we cannot find that the legislative history supports the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. The most that can be said is that the Rail Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act.

Id. at 133.⁸

b. The Court reiterated and applied the principles of the *Rail Act Cases* in *Ruckelshaus v. Monsanto Co.*, *supra*. In *Monsanto*, an applicant for a pesticide registration sought a declaration that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et*

⁸ The rule that Congress's withdrawal of the Tucker Act remedy must be express and unambiguous follows from two accepted canons of statutory construction. First, because "repeals by implication are not favored * * * [t]he intention of the legislature to repeal 'must be clear and manifest.' " *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Red Rock v. Henry*, 106 U.S. 596, 601, 602 (1883)). See also *Monsanto Co.*, 467 U.S. at 1017; *Rail Act Cases*, 419 U.S. at 133-134; cf. *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981) ("treaty exception" to Claims Court jurisdiction (28 U.S.C. 1502) does not affect Claims Court jurisdiction over takings claims under Tucker Act). Second, "when a statute is ambiguous, 'construction should go in the direction of constitutional policy.' " *Rail Act Cases*, 419 U.S. at 134 (quoting *United States v. Johnson*, 323 U.S. 273, 276 (1944)).

seq., effected a taking of its property (trade secrets) without providing just compensation. The provisions at issue allowed public disclosure and public use of an applicant's trade secret data concerning the safety and environmental effects of the product to be registered. FIFRA, however, provided compensation only in limited circumstances. The district court found that the statute's compensation scheme was insufficient to compensate fully the applicant and that Congress had not intended to provide a Tucker Act remedy. The district court, therefore, held that the challenged provisions resulted in an unconstitutional taking without just compensation.

This Court reversed because Congress had not expressed an unambiguous intent to withdraw the Tucker Act remedy. 467 U.S. 986 (1984). The Court closely adhered to its analysis in the *Rail Act Cases* by noting that "[n]owhere in FIFRA or in its legislative history is there a discussion of the interaction between FIFRA and the Tucker Act." *Id.* at 1017. The Court concluded:

Congress' failure specifically to mention or provide for recourse against the Government may reflect a congressional belief that use of data by EPA in the ways authorized by FIFRA effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. In any event, the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy.

467 U.S. at 1018-1019.

c. The point of the *Rail Act Cases* and *Monsanto* is that the Tucker Act applies to all takings claims against the United States unless Congress states its "unambiguous intention to withdraw the Tucker Act remedy" (*Monsanto*,

467 U.S. at 1019). The absence of a specific statutory provision authorizing compensation for a particular taking does not deprive the Claims Court of jurisdiction. See also *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 328-330 (1922). Nor is the Tucker Act unavailable simply because Congress did not intend to effect a taking. See *Monsanto*, 467 U.S. at 1019; *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 21-23 (1940). A congressional limit on the amount that can be spent under a particular Act does not withdraw the Tucker Act remedy in the event that application of the Act results in a taking. See *Rail Act Cases*, 419 U.S. at 127-128; cf. *Hurley v. Kincaid*, 285 U.S. 95, 102 n.2 (1932) (Tucker Act available for diversion of flood waters onto farmland even though statute at issue explicitly exempted United States from liability "for any damage from or by flood waters at any place"). And the Tucker Act remains available where Congress never thought about whether a compensable taking would occur (*Monsanto*, 467 U.S. at 1019), or where Congress thought that its statutory scheme would provide all the compensation that would be due (*Rail Act Cases*, 419 U.S. at 128). The court in *Armijo v. United States*, 663 F.2d 90, 95 (Ct. Cl. 1981), accurately summarized these rules:

In authorizing activities that may or may not infringe on property rights yet in making no provision for payment if they do, Congress must be deemed to hope that it will not infringe, but to intend that if it does, the Tucker Act and the standing appropriation to pay Court of Claims judgments, will be the safety net that will save any violation of the fifth amendment from occurring and by the same token will save the project from being stymied by court injunctions.

2. Petitioners cite no unambiguous evidence that Congress intended to withdraw the Tucker Act remedy when it enacted the 1983 Amendments to the Trails Act. On the contrary, the 1983 Amendments and their legislative history show that Congress was completely silent on the issue of the Tucker Act, just as it was when it enacted the Rail Act and FIFRA. And it is settled that congressional silence is not an expression of an "unambiguous intention to withdraw the Tucker Act remedy" (*Monsanto*, 467 U.S. 1019).

a. Petitioners recite (Br. 27) statements in the legislative history of the 1983 Amendments that show congressional concern that the statute operate "at low cost." H.R. Rep. No. 28, *supra*, at 3. See also S. Rep. No. 1, 98th Cong., 1st Sess. 3 (1983). This Court made it clear in the *Rail Act Cases*, however, that evidence of congressional concern about the public fisc is insufficient to signal an unambiguous intent to withdraw the Tucker Act. See 419 U.S. at 126-132. Indeed, the Act at issue in the *Rail Act Cases* placed an express ceiling on expenditures (419 U.S. at 128), and the bill's manager in the House of Representatives expressed his view that "there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that * * * [are] to be approved by an Act of Congress." 383 F. Supp. at 528. The Court nevertheless found those expressions insufficient to withdraw the Tucker Act remedy. 419 U.S. at 126-132. Accordingly, Congress's wish that the 1983 Amendments operate at "low cost" is not unambiguous and convincing evidence that Congress impliedly repealed the Tucker Act. See also *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1556 (Fed. Cir. 1985) (Congress's creation of a coal exchange program to provide compensation for interests taken under the Surface Mining Control

and Reclamation Act did not reflect an intent to preclude a Tucker Act remedy even though the exchange mechanism was calculated to "reduc[e] the cash outflow from the Treasury").⁹

Indeed, congressional statements that the 1983 Amendments were intended to operate "at low cost" are entirely consistent with the availability of the Tucker Act remedy. To establish more nature trails in 1983, Congress could have adopted a program whereby the federal government would have purchased all the property, constructed the trails, and then maintained them. Instead, Congress adopted the "low cost" alternative of Section 8(d). Under Section 8(d), it is unclear how much money (if any) the United States will have to pay under the Fifth Amendment. Many railroad rights-of-way are held in fee simple. See *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 703

⁹ Petitioners also cite (Br. 28) a comment made by Senator Domenici that "the Federal Government has acquired too much land from landowners using condemnation procedures that in essence short changed the property rights of landowners." The Senator made that statement in the context of praising the statute for "encourag[ing] cooperation" rather than condemnation. See 129 Cong. Rec. 1607 (1983). Thus, his comments were likely directed at the provisions of the Act involving the use of voluntary agreements between trail managers and landowners, as well as voluntary citizen participation, see 16 U.S.C. 1246(h) (1982 & Supp. V 1987). In any event, Section 8(d) does not contemplate that government agents will use "condemnation procedures." A taking will occur, if at all, by the ICC's authorization of interim trail use in a case where an easement otherwise would have reverted to adjacent property owners. And Senator Domenici did not even hint that a Tucker Act remedy would be unavailable in such a case. See *Florida Rock Industries v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (Tucker Act remedy available for taking under regulatory statute that did not authorize condemnations); *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984) (same).

(D.C. Cir. 1988). Others are held by easements that do not revert upon interim use as nature trails. See, e.g., *State by Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543 (Minn. 1983); *Rieger v. Penn Central Corp.*, No. 85-CA-111 (Ct. App. Greene County, Ohio, May 21, 1985). There will be many instances, therefore, when there will be no plausible takings claims. Finally, the maintenance of trails established under Section 8(d) is the responsibility of a local government or a qualified private organization; the United States does not bear those costs. In the end, therefore, the Section 8(d) approach is a "low cost" method for the establishment of new nature trails when compared to possible alternatives. There is accordingly no basis for assuming that Congress would have refrained from enacting Section 8(d) if it had focused on the fact that compensation would be available under the Tucker Act for any takings of property that might result. Compare note 11, *infra*.

b. Petitioners next rely (Br. 26-27) on a sentence in the 1983 Amendments entitled "Limitations on Appropriations." The sentence states:

Notwithstanding any other provision of this Act, authority to enter into contracts, and to make payments, under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts.

§ 101, 97 Stat. 42. That provision, however, is far from an unambiguous withdrawal of the Tucker Act remedy.

The sentence on its face does not even refer to or purport to amend the Tucker Act. On the contrary, the sentence begins with the clause—"Notwithstanding any other provision of this Act"—which refers to the 1983 Amendments. Thus, the sentence simply means that payments under the 1983 Amendments are effective only

"in such amounts as are provided in advance in appropriation Acts." That provision, which is common in statutes authorizing expenditures,¹⁰ does no more than restate the command found in Article I, Section 9, of the Constitution—"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The plain intent of the sentence—to ensure that payments under the 1983 Amendments are authorized—is fully consistent with a Tucker Act remedy in this case. In the first place, it would not be natural to say that a payment for a takings claim would be made "under" the 1983 Amendments. Such a payment would be made under the Fifth Amendment and the Tucker Act. See generally *United States v. Causby*, 328 U.S. at 267 ("[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine"). And even if such payments were made "under" the 1983 Amendments, they would be made out of the Judgment Fund, which is an appropriated fund. See 31 U.S.C. 1304(a). Accordingly, if petitioners make a valid claim in the Claims Court that Section 8(d) has worked a taking of their property, the United States will pay the judgment out of the appropriated Judgment Fund. That result would be wholly consistent with congressional intent that payments under the 1983 Amendments be made with the authorization of an appropriations Act.

¹⁰ See, e.g., Public Rangelands Improvement Act of 1978, 43 U.S.C. 1906; Biscayne National Park Act, 16 U.S.C. 410gg-5; Manassas National Battlefield Park Amendments of 1980, Pub. L. No. 96-442, § 3(b), 94 Stat. 1887; Conservation Programs on Government Lands Act, 16 U.S.C. 670o(d); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1308; Nuclear Waste Policy Act of 1982, 42 U.S.C. 10105; Job Training Partnership Act, 29 U.S.C. 1581.

Furthermore, the type of limit on expenditures that petitioners cite has never been held to prohibit payments under the Tucker Act for takings (intended or unintended) that occur as a result of authorized activities. For example, in the comprehensive National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, Congress included an appropriations provision almost identical to the provision relied upon by petitioners. A private landowner then brought suit against the government in which he claimed that Section 708 of the Act (92 Stat. 3529-3530), which prohibited mining within the banks or beds of designated rivers, caused a taking of his property. The Federal Circuit held that Congress had not withdrawn the Tucker Act remedy. The court found "nothing in the language of section 708 [or its legislative history] indicating that Congress intended to withdraw the Tucker Act remedy." *Skaw v. United States*, 740 F.2d 932, 939 (1984).

In sum, neither ground cited by petitioners as evidence of Congress's unambiguous intent to withdraw the Tucker Act remedy withstands scrutiny.¹¹ In fact, it is evident that Congress gave "no thought to consideration of withdrawal of the Tucker Act remedy" (*Rail Act Cases*, 419 U.S. at 129) when it amended the Trails Act in 1983. As the Eighth Circuit recently noted in holding that the Tucker Act

¹¹ Petitioners' reliance (Br. 25-26) on *Hodel v. Irving*, 481 U.S. 704 (1987), is misplaced. In that case, the Court invalidated one section of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, because it resulted in an uncompensated taking. The United States had interpreted the statute as withdrawing the Tucker Act remedy—i.e., as a regulatory measure that Congress would not have enacted if compensation were required. Accordingly, both the parties and the Court treated the case as one in which Congress "did not authorize either purchase or condemnation and the payment of just compensation * * *." 481 U.S. at 719 (Stevens, J., concurring in the judgment).

remedy is available for takings that allegedly result from Section 8(d), "[t]he statute and its legislative history are simply silent" on the question of the Tucker Act. *Glosemeyer v. Conservation Fed'n*, No. 88-1863 (July 5, 1989), slip op. 19.¹²

In contrast to the 1983 Amendments, Congress has passed legislation that expressly modifies the Tucker Act. For instance, in 1988 Congress enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924, which divided an Indian reservation between Hoopa and Yurok interests. Responding to concerns regarding possible takings, Congress adopted Section 14(c) of the Settlement Act (102 Stat. 2936-2937) to delay payments under the Tucker Act and to require the Secretary of the Interior to report to Congress about final judgments made for Fifth Amendment takings. That statute is stark evidence that Congress knows how to modify the Tucker Act if it so chooses. In this case, however, Congress was absolutely silent on the subject. Accordingly, the 1983 Amendments do not unambiguously repeal any remedy that petitioners might have under the Tucker Act.¹³

¹² The district court in *Glosemeyer* had noted that "Congress either did not believe that the postponement of a railroad's abandonment of a right-of-way constituted a taking or assumed that the general grant of jurisdiction under the Tucker Act would provide a necessary remedy for any taking that might be found to have occurred." *Glosemeyer v. Missouri-Kansas-Texas, R.R.*, 685 F. Supp. 1108, 1121 (E.D. Mo. 1988).

¹³ The court of appeals in this case did not discuss the availability of a Tucker Act remedy for any taking claim involving Section 8(d); it held that Section 8(d) never could effect a taking. We do not defend the judgment on that rationale, which conflicts with the District of Columbia Circuit's opinion in *National Wildlife Fed'n v. ICC*, 850 F.2d 694 (1988). For reasons we shall explain (pp. 22-24, *infra*), there is no need for the Court to address that question in this case, which presents only a facial attack on the constitutionality of Section 8(d).

c. Petitioners lastly contend that no Tucker Act remedy exists for unauthorized acts of government officials. That proposition is true, see *Rail Act Cases*, 419 U.S. at 127 n.16, but not applicable to this case. Petitioners do not contend that the ICC violated some statutory duty in this case. On the contrary, Section 8(d) plainly authorized the Commission to approve the interim use agreement at issue in this case and to deny petitioners' request for abandonment. Petitioners' claim is that the grant of authority under Section 8(d) is unconstitutional, not that the ICC exceeded its authority. Thus, the cases cited by petitioners (Br. 29-31) "are inapposite since the Government actions at issue here are authorized by" Section 8(d). *Rail Act Cases*, 419 U.S. at 127 n.16.

C. Section 8(d) of the Trails Act Is Not Unconstitutional On Its Face Even If Congress Withdrew the Tucker Act Remedy

1. Even if the Court were to decide that the 1983 Amendments repealed the Tucker Act, it would not follow that Section 8(d) is unconstitutional on its face. Rather, Section 8(d) would be unconstitutional only if applied in cases where it would result in an uncompensated taking. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) ("a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner"). And it is disputed whether a taking of any property interest of petitioners occurred in this case. Accordingly, it would then be proper to remand this case to the ICC to develop a record and to decide in the first instance whether interim trail use would result in a taking of petitioners' property.

This Court has repeatedly stated that "the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclama-*

tion Ass'n, 452 U.S. 264, 294-295 (1981). "Adherence to this general rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Id.* at 295. Because the Court has been "unable to develop any set formula" by which to measure government action against the Fifth Amendment, it has held that taking questions often must be examined by engaging in specific "factual inquiries" on a case-by-case basis. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citation omitted). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-129 (1978).

2. In this case, the nature of petitioners' property interest, if any, has not yet been determined. Petitioners and the State of Vermont dispute whether the interest acquired in 1899 by the State's predecessor in interest, the Rutland-Canadian Railway, was an easement or an estate in fee simple. If the interest was acquired in fee simple, then petitioners have no right in the property whatsoever and, consequently, no basis for a takings claim. See *National Wildlife Fed'n v. ICC*, 850 F.2d at 703. Moreover, even if the railroad acquired only an easement, the question whether petitioners have a colorable claim of a taking would depend upon the terms of that easement.

The document creating an easement may specify the events on which a reversionary interest will vest in possession, may speak in ambiguous terms, or may be completely silent on the issue. And in all cases, state law will guide the inquiry into the intent of the parties and whether that intent will be respected. Thus in some cases, interim trail use may cause an easement to revert; in other cases, it may not. Compare *State by Washington Wildlife Preservation, Inc. v. State*, *supra* (no reversion) with *McKinley v. Waterloo R.R.*, 368 N.W.2d 131, 133-134 (Iowa 1985) (reversion). Finally, any takings analysis must take into account other factors, such as the character of the govern-

mental action and the property owner's investment-backed expectations. See *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 488-497 (1987).

All of these factors are relevant, and none may be evaluated except in the context of a fully developed record. See generally *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (FCC determined on basis of full record that charges set for usage of telephone poles did not result in a taking). A remand to the ICC would enable the Commission to create such a complete record in this case.¹⁴

II. SECTION 8(d) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE

1. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, *supra*, the Court reiterated the proper test for determining whether a statute constitutes a valid exercise of Congress's power under the Commerce Clause of the Constitution (Art. I, § 8). The Court stated (452 U.S. at 276):

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a

¹⁴ In *National Wildlife Fed'n v. ICC*, *supra*, the D.C. Circuit reviewed the Commission's regulation implementing Section 8(d). Ruling that Section 8(d) could, in a given case, effect a taking, the court remanded the regulation to the Commission for reconsideration in light of the court's Fifth Amendment analysis. On remand, the Commission readopted its rules. *Ex Parte No. 274, Rail Abandonments/Use of Rights-of-Way as Trails/Supplemental Trails Act Procedures* (Sub. No. 13), served Feb. 23, 1989. The Commission stated that a Tucker Act remedy is available for any taking that may have occurred, and thus reasoned that the Claims Court is the proper forum to decide any question of just compensation under the Fifth Amendment. If this Court decides that the Claims Court has no Tucker Act jurisdiction over claims resulting from Commission orders applying Section 8(d) of the Trails Act, it will be necessary for the ICC to reevaluate its rules.

regulated activity affects interstate commerce, if there is any rational basis for such a finding. * * * This established, the only remaining question for judicial inquiry is whether "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." * * * The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme.

Petitioners argue (Br. 36-39) that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)—a case that did not address the government's power to act but, rather, the government's power to act without paying for it—implicitly overruled the test set out in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*. We disagree.

In *Nollan*, the plaintiffs challenged a California building permit whose issuance had been conditioned by the California Coastal Commission on plaintiffs' granting the public an easement across their beach. The plaintiffs contended that the Coastal Commission had taken an easement without paying just compensation. The Court agreed because the "lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." 483 U.S. at 837.

It is apparent that *Nollan* does not address—and had no occasion to address—the power of Congress to enact laws under the Commerce Clause. *Nollan* is relevant to the question whether a taking has occurred, but it has nothing to do with whether Congress may pass a law under the Commerce Clause. The two questions are distinct. In *Kaiser Aetna v. United States*, *supra*, the Court observed: "In light of its expansive authority under the Commerce

Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question." 444 U.S. at 174. See also *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982) (rationality inquiry is "quite separate" from question of whether statute effects a taking); *National Wildlife Fed'n v. ICC*, 850 F.2d at 705. Accordingly, petitioners err in contending that *Nollan* imposed a new restraint on Congress's power under the Commerce Clause. *Nollan* is relevant to whether Congress must pay for a taking, not whether Congress may take property for which it provides compensation.

2. The court of appeals below, in accordance with decisions of the Eighth and the District of Columbia Circuits, correctly held that Section 8(d) is a legitimate exercise of Congress's Commerce Clause power. See *Glosemeyer*, slip op. 12-14; *National Wildlife Fed'n*, 850 F.2d at 705 ("No one doubts that Congress has the authority to provide that rights-of-way no longer needed for rail use be converted to trail use."). Congress announced two purposes in adopting Section 8(d). First, it intended "to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." 16 U.S.C. 1241(a). See also H.R. Rep. No. 28, *supra*, at 8 (Section 8(d) designed "to encourage the development of additional trails"). Second, Section 8(d) was designed to further a "national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use * * *." 16 U.S.C. 1247(d) (Supp. V 1987). See also S. Rep. No. 1, *supra*, at 9; H.R. Rep. No. 28, *supra*, at 8-9.

There can be no doubt that both those purposes are valid congressional objectives. See generally *Kaiser Aetna v. United States*, 444 U.S. at 174 ("[U]nder the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina."). Congress has a long tradition of providing nature trails for the public's use. See National Trails System Act, Pub. L. No. 90-943, 82 Stat. 919. And it has an even longer tradition of regulating railroad abandonments. See *Colorado v. United States*, 271 U.S. 153 (1926). Indeed, we do not understand petitioners to argue that Congress's announced objectives for Section 8(d) are illegitimate concerns of Congress.

Instead, petitioners seem to argue (Br. 39-43) that Section 8(d) is not a reasonable (or rational) way to preserve railroad rights-of-way. Even if that were true, however, the statute would still be a reasonable way to promote nature trails. And there is no requirement under the Commerce Clause that a statute rationally advance more than one legitimate purpose. Hence, petitioners' objection is wholly immaterial to the question whether Section 8(d) is a valid exercise of Congress's power under the Commerce Clause.

In any event, Congress had a rational basis for believing that Section 8(d) would also serve to protect and preserve the nation's rail corridors. By 1983, when Congress adopted Section 8(d), Congress had for some time been concerned about the loss of rail corridors as an important public resource. In 1973, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, in response to the decline of railroads in the United States after World War II. One goal of that legislation was "the preservation * * * of existing patterns of service by railroads (including short-line and terminal railroads), and

of existing railroad trackage in areas in which fossil fuel natural resources are located * * *." 45 U.S.C. 716(a).

Congress announced an explicit policy of preserving rail corridors when it enacted the 4R Act in 1976. 45 U.S.C. 801-855. Section 809(b) of the 4R Act (90 Stat. 145) directed the Secretary of the Interior to provide financial assistance at all governmental levels "for programs involving the conversion of abandoned railroad rights of way to recreational and conservational uses * * *." And Section 809(c) of the 4R Act (90 Stat. 146) amended the Interstate Commerce Act to require the ICC to consider whether railroad lines found appropriate for abandonment could serve other public purposes. The 4R Act also directed the Secretary of Transportation to study the advantages of "establishing a rail bank consisting of selected rights-of-way, as a means of assuring their availability for potential railroad use in the future * * *." § 809(a), 90 Stat. 144, 145. The Secretary of Transportation's Report, which was issued in 1977, confirmed Congress's concern about the loss of rail corridors. The report noted that "[i]n the previous seven years, rail carriers had either abandoned or had pending applications to abandon 21,000 miles of railroad track in the continental United States." *Glosemeyer*, 685 F. Supp. at 1115.

In 1983, Congress adopted Section 8(d) after its previous efforts to preserve rail corridors met with limited success. The House Report accompanying the bill stated:

Section 208 amends section 8 of the [Trails] Act to encourage the development of additional trails * * *. This reflects the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes. This appears to be true despite the fact that these efforts have also been to

preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.

H.R. Rep. No. 28, *supra*, at 8.

Section 8(d) was clearly a rational way to further the "national policy" of preserving "established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d) (Supp. V 1987). Congress provided that the trail user is to assume responsibility for liability in connection with the trail use, including managing the property and paying taxes on the corridor. Thus, Section 8(d) allows for the route to remain intact and available for future rail use while relieving the railroad of financial responsibility during the period of interim use. See H.R. Rep. No. 28, *supra*, at 8-9. Congress's finding that Section 8(d) is a rational method of preserving rail corridors — one described by the Second Circuit as "remarkably efficient" (Pet. App. 10) — is not to be second-guessed by the courts. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 283 ("effectiveness of existing laws in dealing with problem identified by Congress is ordinarily a matter committed to legislative judgment").

3. At bottom, petitioners' claim seems to be (Br. 39-46) that Congress was more concerned with nature trails than it was with preserving rail corridors.¹⁵ That contention — even if true — is no constitutional objection to Section 8(d). Section 8(d) is valid under the Commerce Clause if it only is a rational way to create and maintain nature trails.

¹⁵ Petitioners note (Br. 42), for example, that Section 8(d) originated in congressional committees concerned with nature, not transportation.

In any event, there is no reason to accept petitioners' contention that Congress was not telling the truth when it expressed a purpose to preserve rail corridors. Section 8(d) can obviously play a significant role in maintaining rail corridors for future use. A railroad seeks to abandon a line when it is unprofitable and the continuation of rail service would be burdensome. But economic conditions may change and a particular line that is now unprofitable may become viable with the introduction of new industry in the area. If the availability of the railroad's line and right-of-way can be preserved in the meantime, then it is possible that service could be restored in the future. Congress passed Section 8(d) to allow for that possibility.¹⁶

Petitioners argue (Br. 42) that the "railbanking" purpose of Section 8(d) is not advanced by the law because the Commission does not make an individualized finding that a particular right-of-way might be needed in the future. Congress, however, may constitutionally legislate with a broad brush. See generally *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (Congress rationally prohibited interstate shipment of all skimmed milk mixed with non-milk products). See also *Perez v. United States*, 402 U.S. 146, 154 (1971). And as the Commission noted in its recent policy statement, "the fact that the railroad agrees to trail use is indication in and of itself that the corridor may be valuable in the future for transportation" (*Ex Parte No. 274, Rail Abandonments/Use of Rights-of-Way as Trails/Supplemental Trails Act Procedures* (Sub. No. 13), served Feb. 23, 1989). Accordingly, although peti-

¹⁶ This purpose of Section 8(d) was served in *Chicago & North Western Transp. Co. - Abandonment Exemption - Guthrie and Dallas Counties, IA*, ICC No. AB-1 (Sub. No. 192X), not printed, served May 20, 1987, when the Commission approved interim trail use in a case where the railroad line might be needed in the future to serve a proposed power plant.

tioners may think that Section 8(d) is bad policy or even that Congress could have drafted a more effective law, there is no doubt that Congress could rationally believe that Section 8(d) would advance the dual goals of creating nature trails and preserving rail corridors for possible future use. The Commerce Clause permits no further judicial inquiry.

CONCLUSION

The judgment of the court of appeals upholding the Commission's order should be affirmed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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Supreme Court of the United States
October Term, 1960

J. PAUL FREEMAN AND PATRICK FREEMAN,
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VERMONT COMMERCE COMMISSION,
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON AND VERMONT RAILWAY, INC.,
Respondents.

In View of Certiorari to the
United States Court of Appeals
for the Second Circuit

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QUESTIONS PRESENTED

1. Whether exercise of the powers conferred on Congress by the Commerce Clause should be restricted under some new test of heightened scrutiny, even though the field at issue is railroad regulation, where Commerce Clause powers always have been broadly interpreted?

2. Whether the National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d) ("section 1247(d)"), work a taking of the Preseaults' property, even though the effect on the railroad right-of-way in which the Preseaults claim a reversionary interest is no different from federal regulation of railroad abandonments generally?

3. Whether, assuming *arguendo* that section 1247(d) in some instances might result in a taking, this Court should overrule the long line of cases holding that the Tucker Act, 28 U.S.C. § 1491, is available to afford the just compensation remedy necessary to preserve the constitutionality of clearly authorized federal regulatory action?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 88-1076

J. PAUL PRESEALT AND PATRICIA PRESEALT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON AND VERMONT RAILWAY, INC.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR RESPONDENTS
STATE OF VERMONT, CITY OF BURLINGTON
AND VERMONT RAILWAY, INC.

COUNTERSTATEMENT OF THE CASE

Governmental Regulation of Railroads

Federal and (to the extent not preempted by the federal government) state regulation of railroad operations and property, including railroad abandonments, is comprehensive and long-standing. From the first days of the industry, the states regulated railroad construction and

abandonments, both because of the "public highway" character of railroads and the "common carrier" nature of their services to the public. In general, the states tried to preserve railroad corridors, even where current operations were uneconomic.

The stress of mobilization during World War I revealed many flaws in the nation's transportation system. To achieve greater consistency in regulation of the railroad industry and, under appropriate circumstances, facilitate abandonment of lines burdensome to interstate commerce, Congress, beginning with the Transportation Act of 1920, ch. 91, § 402, 41 Stat. 456, 477 ("Transportation Act of 1920" or "1920 Act"), conferred broad jurisdiction upon the Interstate Commerce Commission ("ICC") to regulate both railroad abandonments and discontinuances of service (a step short of complete abandonment). (This authority is now codified at 49 U.S.C. §§ 10901-06.) Prior to the 1970's, however, the ICC granted abandonments only reluctantly and after prolonged delay, in part because of the interest of state and local governments in preserving railroad corridors for future use.

With the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and other deregulation measures, Congress determined to ease the obstacles faced by the railroad industry in competing with other transportation modes. At the same time, however, Congress moved to provide state and local governments (as well as shippers and other private parties) new opportunities to preserve railroad corridors threatened with abandonment. A key change was to shift the burden of corridor preservation from the carrier seeking abandonment to the proponents of preservation. Thus in section 402 Congress substituted a new 49 U.S.C. § 10905, providing a mechanism for transferring railroad lines threatened with abandonment to new owners for continued railroad use. See H.R. Rep. No. 1430, 96th Cong. 2d Sess. 125-26, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4157-58. In section 403 of

the Staggers Rail Act of 1980, Congress also continued measures designed to foster preservation of railroad corridors for alternative public uses (*see* 49 U.S.C. § 10906), specifically including preservation for future rail use (a concept known as "railbanking").

Since adoption of the Staggers Act and related deregulation measures, the pace of railroad abandonments has roughly tripled (from an average of 1,000 miles per year to 3,000 miles per year). Given that railroads are one of the most energy efficient and environmentally sound means of surface transportation, it is now, more than ever, important for state and local governments to take appropriate measures to preserve rail corridors for future use.

Section 1247(d)

Consideration of the legislative background of the "rails-to trails" program is essential to an understanding of this case. In 1968, Congress enacted the National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16 U.S.C. §§ 1241 *et seq.*) ("Trails Act"), to establish a nationwide system of trails and encourage voluntary efforts to create more local trails. The Trails Act, at its inception, recognized that railroad rights-of-way¹ might be suitable for trail use. See 16 U.S.C. § 1248(b) (ICC to cooperate in making railroad rights-of-way available for trail use). Congress first tried to encourage such adaptation in § 809 of the Railroad Revitalization and Regulatory Reform ("4-R") Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 144 (codified as amended at 49 U.S.C. § 10906), by providing for studies on preservation of railroad rights-of-way, as well as measures to encourage voluntary conversion of railroad corridors to recreational trails.

¹ "The term 'right-of-way,' in the context of railroad property interests, is a term of art signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land." *Idaho v. Oregon S.L. R.R.*, 617 F.Supp. 207, 210 (D. Idaho 1985).

Recognizing that interim trail use of railroad corridors could serve not only "railbanking" by relieving carriers of the burdens of corridor management, but also further Trails Act objectives, Congress in 1983 linked railbanking and trail use by amending the Trails Act to add the current section 1247(d). See Pub. L. No. 98-11, § 208, 97 Stat. 48 (codified at 16 U.S.C. § 1247(d)). Divided into its three component sentences, section 1247(d) provides as follows:

1. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage state and local agencies and private interests to establish appropriate trails using the provisions of such programs.

2. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with the National Trails System Act, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

3. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent

with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use. According to the legislative history, "[t]he key finding of [section 1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." H.R. Rep. No. 28, 98th Cong., 1st Sess. 8, reprinted in 1983 U.S. Code Cong. & Ad. News 112, 119-20.²

The Rutland-Canadian Right-of-Way

The factual history of the case began in 1898, when the Vermont legislature chartered the Rutland-Canadian Railroad Co. ("Rutland-Canadian") to build a new railroad from Burlington to the Canadian border. 1898 Vt. Acts No. 160, Brief in Opposition ("Br. Op.") at 3a-6a.³

² The ICC published proposed Trails Act rules in Rail Abandonments; Use of Rights-of-Way as Trails, 50 Fed. Reg. 7200 (Feb. 21, 1985). Final rules were adopted in Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986). Following the remand in *National Wildlife Fed'n v. ICC*, 850 F.2d 694 (D.C. Cir. 1988), the ICC readopted its procedures for invoking § 1247(d). To the court of appeals' directive that it address the question of whether application of § 1247(d) might constitute a compensable taking of the property interests of reversionary claimants, the ICC responded with a policy statement reiterating that § 1247(d) either was not a taking or, if it were a taking in some instances, that the Claims Court under the Tucker Act (28 U.S.C. § 1491) would be "the proper forum to decide any compensation claims." Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (Feb. 24, 1989), appeal docketed sub nom. *Beres v. ICC*, No. 89-1178 (D.C. Cir. Mar. 14, 1989).

³ In § 10 of the Rutland-Canadian charter, the Vermont legislature declared that the act should "be deemed and taken to be a public act" and, further, that the act should "at all times be under the control of the legislature to amend to repeal as the public good may require." Br. Op. at 6a.

At the time the Rutland-Canadian charter was granted, the most recent codification of Vermont's general statutes on railroad condemnation appeared at Vt. Stat. §§ 3808-32 (1894). (Extracts are reprinted in Br. Op. at 1a-2a.) In a companion statute, Vt. Stat.

The Rutland-Canadian then acquired its right-of-way, both by purchase and through use of eminent domain powers delegated by the Vermont legislature in the act of incorporation. On August 14, 1899, commissioners appointed by the Vermont Supreme Court made awards to several property owners with whom the Rutland-Canadian had failed to reach voluntary agreement on damages, including the Barker Estate from which the Preseaults claim succession.⁴

In 1900, as the new line approached completion, the Rutland-Canadian and several other subsidiaries of the Rutland Railroad Co. ("Rutland") were consolidated into the Rutland. 1900 Vt. Acts No. 153, Br. Op. at 10a-12a.⁵ In 1950 after many years of receivership and bankruptcy, the old Rutland Railroad Co. was succeeded by the Rutland Railway Corp. ("Rutland Railway").⁶ The new corporation operated the railroad, including the former Rutland-Canadian segment, until a strike in late 1961 prompted management to seek liquidation. In 1962 the ICC authorized the Rutland Railway to abandon its entire system, subject to a public use condition that it sell viable segments of the line at net salvage value for continued railroad service.⁷

§ 3746 (1894), the State reserved an option, at any time after 20 years from the opening of a railroad for use, to purchase from "the corporation the railroad, and the franchise, property, rights and privileges of the corporation." Br. Op. at 1a.

⁴ See August 14, 1899 Commissioners' Award to the William H. Barker Estate, Br. Op. at 7a-9a.

⁵ The consolidation act provided that "title to all real estate taken by deed or otherwise" by any of the predecessor companies should "not be deemed to revert" but should vest in the Rutland. 1900 Vt. Acts No. 153, § 4, Br. Op. at 10a-11a.

⁶ The Rutland Railway's corporate history is briefly chronicled in *Rutland Ry. Corp.—Abandonment of Entire Line*, 317 I.C.C. 393, -397-98 (1962). See also *Rutland R.R.—Reorganization*, 271 I.C.C. 44, 1948, modifying 267 I.C.C. 153 (1947) and 267 I.C.C. 89 (1946).

⁷ *Rutland Ry. Corp.—Abandonment of Entire Line*, supra note 6.

Shortly thereafter, the Vermont legislature authorized purchase by the State of Vermont ("the State") of sections of the Rutland Railway for sale or lease "to any responsible person, firm or corporation, for continued operation of a railroad, or other public purpose, provided, if necessary, approval for such continued operation, or other public purpose is granted by the [ICC]." 1963 Vt. Acts No. 162, § 4, Br. Op. at 13a-14a (emphasis added). In late 1963, the ICC approved the first such arrangement between the State and a lessee/operator. *Vermont and Vermont Ry., Inc.—Acquisition and Operation*, 320 I.C.C. 330 (1963), modified 320 I.C.C. 609 (1964). Actual conveyance of the Bennington-Burlington line to the State by the Rutland Railway followed on January 1, 1964 and the lease from the State to the newly-organized Vermont Railway, Inc. ("VTR")⁸ took effect on January 6, 1964. See Joint Appendix ("Jt. App.") at 10.

To maintain railroad service to an industry in the northern part of Burlington, the 1964 purchase and lease included a 1.8 mile stub of the former Rutland-Canadian. See *Rutland Ry. Corp.—Abandonment of Entire Line*, supra, 317 I.C.C. at 432-33. The 1.8 mile stub included the parcel in which the Preseaults now claim to have succeeded to a reversionary interest. In 1975, several years after the industry's relocation ended demand for local service on the 1.8 mile stub, VTR, in need of materials for track repairs, removed the northernmost 1.35 miles of remaining trackage—including the trackage in the immediate vicinity of the Preseault property. At the time, neither the State nor VTR applied to the ICC for permission to discontinue service over or abandon the line. However, because the only customer on the branch had relocated, the ICC did not receive any shipper complaints. See Jt. App. at 13-14, 20-21.

⁸ Pursuant to Sup. Ct. R. 28.1, VTR notes that it is affiliated with the Clarendon & Pittsford Railroad Co., with which it shares common ownership and management.

The State Court Proceedings

In 1981, a group of abutting landowners (including the Preseaults, who had acquired part of the former Barker Estate in 1980) brought an action in state court against the State, VTR and the City of Burlington ("the City"), seeking to quiet title to the right-of-way in the abutters' favor.⁹ In 1985, the Supreme Court of Vermont affirmed dismissal of the action for lack of subject matter jurisdiction,¹⁰ holding that the state court's determination necessarily would have to involve adjudication of the issue of abandonment, a matter within the exclusive and plenary jurisdiction of the ICC under federal law. *Trustees of the Diocese v. State*, 145 Vt. 510, 496 A.2d 151 (1985).

The ICC Proceedings

In June 1985, the State, through its Agency of Transportation, joined by VTR, agreed to lease the 1.8 mile North Burlington branch to the City for interim use as a bicycle and pedestrian path, Br. Op. at 17a-24a. In July 1985, the Preseaults and two other abutters filed with the ICC a "Petition by Non-carriers for a Determination of Exemption from the Jurisdiction of the Interstate Commerce Commission and/or Finding of *De Facto* Abandonment" (ICC Finance Docket No. 30702), Joint Jt. App. at 3-7. The State protested, Jt. App. at 9-17, and, joined by VTR, filed a joint reply. Jt. App. at 19-23. The City also protested, Jt. App. at 25-26, and filed a reply. Jt. App. at 27-30.

⁹ The complaint did not raise an inverse condemnation claim.

¹⁰ Contrary to the assertion now made by the Preseaults, Brief for Petitioners ("Br. Pet.") at 4 n.3, the Vermont courts, in passing on the jurisdictional issue raised by the City under Vt. R. Civ. P. 12(h)(3), did not reach the merits of whether the Rutland-Canadian acquired the fee interest in the condemned lands or an easement for railroad purposes. Throughout the course of this litigation, neither the State, VTR nor the City has ever conceded that the Rutland-Canadian took less than a fee interest in the condemned lands. See Br. Op. at 12 n.12.

In November 1985, prior to the ICC's having taken any action in Finance Docket No. 30702, the State and VTR jointly filed with the ICC a "Verified Notice of Exemption" (ICC Docket No. AB-265 [Sub-No. 1X]) under 49 C.F.R. § 1152.50 (1985). Jt. App. at 43-53.¹¹ The exemption notice sought formal ICC permission to discontinue service over the North Burlington branch and make the involved properties available to the City under section 1247(d) during the period of time that rail service remained discontinued. *Id.*

On January 2, 1986, after allowing the abutters' motion to consolidate, the ICC granted the exemption petition in Docket No. AB-265 (Sub-No. 1X), allowing formal discontinuance of railroad service¹² and conversion to trail use to become effective on February 5, 1986. 51 Fed. Reg. 454, Jt. App. at 55-59. At the same time, the ICC dismissed the abutters' petition in Finance Docket No. 30702. *Id.* On July 7, 1987, the ICC denied the abutters' petition for reconsideration and/or clarification. *Vermont and Vermont Ry., Inc.—Discontinuance of Service Exemption—In Chittenden County, Vt.*, 3 I.C.C. 2d 903 (1987), reprinted in Petition for a Writ of Certiorari, Appendix ("Pet. App.") at 47-54.

Review of the ICC Decision

On September 18, 1987, the Preseaults filed a petition in the United States Court of Appeals for the Second Circuit seeking review of the ICC's decision. Pet. App. at 55. On August 4, 1988, the Second Circuit affirmed the ICC's decision. *Preseault v. ICC*, 853 F.2d 145, reprinted in

¹¹ The notice reprinted in the Jt. App. at 43-53, dated December 16, 1985, is a corrected version that remedied an earlier failure to provide pre-filing notice to the Military Traffic Management Command. In all other respects, it is identical to the original notice filed in November.

¹² The State and VTR had not requested ICC authorization for actual abandonment.

Pet. App. at 1-13. The court first determined that section 1247(d) serves two legitimate goals under the Commerce Clause: (1) preserving rail corridors for future railroad use and (2) permitting public recreational use of trails. 853 F.2d at 150. The Second Circuit then went on to hold that "even if [the Preseaults] had the reversionary interest they claim, the statute does not effect a 'taking'." 853 F.2d at 151. The court explained:

The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus [the Preseaults'] reversionary interest, if any, is not postponed any more by the operation of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction.

Id.

On December 27, 1988, the Preseaults petitioned this Court for a writ of certiorari. The petition was granted on April 24, 1989. — U.S. —, 109 S.Ct. 1929, 104 L.Ed.2d 401.

SUMMARY OF ARGUMENT

1. For more than 100 years, it has been understood that Congress has plenary power over railroading, including all its instrumentalities. Furthermore, it has been plainly understood that actual assertion of Commerce Clause jurisdiction by Congress would vary with future needs. The potential for expanding Commerce Clause jurisdiction over many aspects of railroading was recognized long before the condemnation that established the right-of-way now at issue. Those entering into transactions with railroads were on notice that future assertion of Commerce Clause jurisdiction could alter otherwise fixed expectations. After the Transportation Act of 1920 added the requirement that railroads obtain prior ICC

authorization for railroad abandonments, this Court recognized that such jurisdiction necessarily invalidated inconsistent remedies under state laws, even those enacted prior to actual assertion of Commerce Clause jurisdiction.

2. By fostering conservation of existing railroad corridors, section 1247(d) is reasonably related to legitimate Commerce Clause interests. But even if the only purpose of the provision were recreational, the statute still would serve legitimate Commerce Clause purposes. The Preseaults' attempt to borrow the strict scrutiny test of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), to curtail the exercise of federal jurisdiction under the Commerce Clause is misdirected. The *Nollan* test does not go to governmental regulatory authority; instead it relates solely to whether compensation must be paid when the police power is exercised to encumber property previously reserved by its owner for private use.

3. The Preseaults implicitly acknowledge that the railroad right-of-way in which they claim a property interest is subject to reasonable railroad regulation. Congress, in enacting section 1247(d), expressly stated its rail regulatory motive. Moreover, the record shows that the State, the City and VTR have made a serious commitment to railbanking. Section 1247(d)—a measure subservient to and directly associated with railroad regulation—should not trigger the requirement to pay additional compensation because it simultaneously advances other ends as well (such as interim trail use).

4. Under the framework of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and subsequent cases, section 1247(d) does not work a taking: (a) the character of railroads as a type of public highway necessarily subordinates any reversionary claims in their rights-of-way to a dominant public servitude, as well as extensive governmental regulation, either by the states or (as has been the case since 1920) by the federal

government; (b) the condemnees from whom the Preseaults claim succession were awarded just compensation in 1899, both for the indeterminate and exclusive occupancy of all lands within the railroad survey (*i.e.*, as for a fee taking, even assuming *arguendo* that the interest taken is labeled an easement rather than absolute title) and for any severance damages to their remaining lands not taken; and (c) there cannot be any reasonable, investment-backed expectation of a right to assert reversionary claims in a railroad right-of-way without regard to the possibility of governmental regulation.

5. Even assuming *arguendo* that section 1247(d) could result in a taking, the Tucker Act (28 U.S.C. § 1491) affords a just compensation remedy that obviates any constitutional problems.

6. Finally, the Preseaults have failed to substantiate any violation of the Due Process Clause.

ARGUMENT

I. THE 1983 AMENDMENT TO THE NATIONAL TRAILS SYSTEM ACT, 16 U.S.C. § 1247(d) ("SECTION 1247(d)"), IS A VALID EXERCISE OF FEDERAL REGULATORY POWER.

A. Railroads are Subject to Broad Regulation Under the Commerce Clause.

The growth and development of Commerce Clause jurisdiction was well underway many years prior to the Rutland-Canadian's 1899 condemnation. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court held that the "regulation of commerce" committed to Congress by the Constitution encompassed the entire field of interstate commerce, with all its means, instruments and appliances, extending even within the jurisdictional boundaries of individual states.

In the mid-nineteenth century, Congress used its authority under the Commerce Clause and its companion,

the Post Road Clause, to keep pace with rapidly changing technology. See, *e.g.*, Act of June 15, 1866, ch. 124, 14 Stat. 66; Act of June 8, 1872, ch. 335, § 201, 17 Stat. 283, 308 (current version at 39 U.S.C. § 5003) (congressional declarations that railroads are to be post roads). In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1 (1877), after upholding the authority of Congress to require railroads to accommodate telegraph lines along their rights-of-way notwithstanding State-created monopolies, this Court emphasized that the reach of the Commerce Clause jurisdiction must be expected to evolve with the times:

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

96 U.S. at 9. This Court recognized that Congress had "plenary power over the whole subject [of railroading]." *California v. Central Pac. R.R.*, 127 U.S. 1, 39 (1887). It was clearly understood that the operation of Commerce Clause jurisdiction would not remain static:

The fact that in recent years interstate commerce has come mainly to be carried on by railroads and

over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and habits of life of the people vary with each succeeding generation. . . . The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

In re Debs, 158 U.S. 564, 590-91 (1894) (disapproved on other grounds, *Bloom v. Illinois*, 391 U.S. 194, 208 (1968)).

The potential for expansion of Commerce Clause jurisdiction also was understood by nineteenth-century Vermonters.¹³ As early as 1890, the Vermont Supreme Court held that parties to transactions involving railroads must be deemed on notice of the possibility of greater regulation by Congress under the Commerce Clause.¹⁴

¹³ For example, the 1886 statute that created Vermont's Board of Railroad Commissioners included the following section:

Sec. 12. If at any time hereafter the Congress of the United States shall pass any acts upon the subject of interstate commerce, or appoint commissioners to make regulations upon that subject, the railroad commissioners appointed under this act shall, as far as consistent with the laws of this State, conform to the laws of the general government, and the recommendations of the national board upon the subject of transportation of passengers and freight, and the subject of said acts and recommendations.

1886 Vt. Acts No. 23, § 12.

¹⁴ *Fitzgerald v. Grand Trunk R.R.*, 63 Vt. 169, 22 A. 76 (1890): [Interstate] commerce is solely regulated by Congress and when parties make contracts to engage in interstate commerce they

Federal regulation of railroads began to assume its present form in 1887 with passage of the Interstate Commerce Act, ch. 104, 24 Stat. 379. And in the Transportation Act of 1920, Congress extended the ICC's jurisdiction to include comprehensive oversight over new railroad construction and abandonment of existing railroads.¹⁵ In *Colorado v. United States*, 271 U.S. 153 (1926), this Court held that the abandonment jurisdiction conferred on the ICC by Congress under the 1920 Act¹⁶ must prevail, even as against a contract claimed between the state and the railroad as a result of a state charter antedating the 1920 Act. 271 U.S. at 165.¹⁷ In

are held to do so upon the basis and with the understanding that changes in the law applicable to contracts may be made. There can in the nature of things be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject, which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority.

63 Vt. at 173, 22 A. at 77. Much of this language from *Fitzgerald* later was quoted with approval in *Louisville & N. R.R. v. Mottley*, 219 U.S. 467, 484 (1911).

¹⁵ In *Schwabacher v. United States*, 334 U.S. 182 (1948), the Court summed up its cases under the Transportation Act of 1920 in these words:

The tenor of all these [cases] was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system.

334 U.S. at 192.

¹⁶ The 1920 Act added a new provision to the Interstate Commerce Act (codified as amended at 49 U.S.C. § 10501(c)) that expressly invalidated state remedies inconsistent with any ICC order or prohibited under any provision of the Interstate Commerce Act. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 329 n.16 (1981).

¹⁷ Cf. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913) (title to submerged lands, even though derived from patent granted by British Crown prior to American Revolu-

recent years, this Court unhesitatingly has characterized the ICC's jurisdiction over railroad abandonment issues as "exclusive and plenary" (*Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, *supra*, 450 U.S. at 321) and has held that state laws relating to post-abandonment disposition of railroad property do not apply until after the ICC's "regulatory mission" comes to an end (*Hayfield N. R.R. v. Chicago & North Western Transp. Co.*, 467 U.S. 622 (1984)).

B. By Facilitating Conservation of Railroad Rights-of-Way, Section 1247(d) Serves Legitimate Commerce Clause Interests.

Under Commerce Clause analysis, the scope of judicial review is "relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). The test for determining whether an exercise of congressional power is valid under the Commerce Clause is

(1) whether there is any rational basis for the congressional finding that the regulated activity affects interstate commerce; and (2) whether "the means chosen by [congress are] reasonably adapted to the end permitted by the Constitution."

Preseault v. ICC, *supra*, 853 F.2d at 149, citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). *Accord Glosemeyer v. Missouri-Kansas-Texas R.R.*, No. 88-1863, slip op. at 13 (8th Cir. July 5, 1989), *aff'g* 685 F. Supp. 1108 (E.D. Mo. 1988) ("*Glosemeyer*").

When section 1247(d) was enacted, Congress had two concerns: preserving the public and quasi-public investment in the national rail network and benefiting the public by encouraging interim trail use of railroad rights-of way:

Section 208 amends section 8 of the act to encourage the development of additional trails in conjunction

tion, held subject to Commerce Clause jurisdiction over navigable waters).

with the provision of the Railroad Revitalization and Regulatory Reform Act of 1976. This reflects concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes. This appears to be true despite the fact that *these efforts have also been to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.*

* * *

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. . . .

H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S. Code Cong. & Ad. News 112, 119-20 (emphasis added).

The congressional concerns served by section 1247(d) reflect two purposes which are valid under the Commerce Clause. *First*, the section facilitates conservation of established rail corridors for future railroad use. *Glosemeyer*, *supra*, slip op. at 13.¹⁸ That purpose was acknowledged as a proper Commerce Clause objective long before

¹⁸ The ICC recognized in its decision below that the State, VTR and the City have demonstrated a serious commitment to preserving the North Burlington branch as a rail corridor:

[T]he lease between Vermont and the City provides Vermont and the Vermont Railway with the right to terminate the lease, 'to relay railroad tracks and resume railroad operations' over all or a portion of the right-of-way, to monitor any renovations or construction affecting the right-of-way and prohibits raising or lowering the existing railroad grade without their approval.

Vermont and Vermont Ry., Inc.—Discontinuance of Service Exemption—In Chittenden County, Vt., *supra*, 3 I.C.C.3d at 906 n.5.

enactment of section 1247(d). *See, e.g., Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973) (ICC "does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations"). *Second*, section 1247(d) facilitates interim trail use of railroad rights-of-way, also a legitimate Commerce Clause purpose. *Glosemeyer, supra*, slip op. at 13.¹⁹

All courts that have looked into the question have agreed that section 1247(d) is a valid exercise of congressional power under the Commerce Clause. *Glosemeyer, supra*, slip op. at 13 ("railbanking is not a mere sham for recreation or conservation uses"); *Preseault v. ICC, supra*, 853 F.2d at 150 (section 1247(d) serves two legitimate Commerce Clause purposes: "(1) preserving rail corridors for future railroad use and (2) permitting public recreational use of trails"); *National Wildlife Fed'n v. ICC, supra*, 850 F.2d at 705 ("[n]o one doubts that Congress has authority to provide that rights-of-way no longer needed for rail use be converted to trails . . .").

The remaining question under Commerce Clause analysis is whether the means adopted by Congress in section 1247(d) are reasonably adapted to these purposes. *Preseault v. ICC, supra*, 853 F.2d at 150. Plainly, the means fit the purpose, for section 1247(d) enables railroads wishing to discontinue service to preserve rights-of-way for future rail use, when they might otherwise be driven to seek outright abandonment of a line. During the

¹⁹ The Preseaults' insinuations to the contrary, trails are not merely a recreational amenity. The Federal-Aid Highway Act recognizes that bicycle paths and pedestrian walkways can serve valid transportation purposes. 23 U.S.C. § 217; *see also* 23 C.F.R. Part 652 (1988) (regulations of Federal Highway Administration on pedestrian and bicycle accommodations and projects). Vermont highway law also recognizes establishment of bicycle routes as a transportation purpose. Vt. Stat. Ann. tit. 19, §§ 2301-10 (1987).

period of trail use, the railroad is protected from liability and relieved of responsibility for maintaining the right-of-way. Because the trail sponsor shields the railroad carrier from the day-to-day costs of corridor conservation, the regulatory burden of railbanking is served without any additional burden on interstate commerce.²⁰ "This seems a remarkably efficient and sensible way to achieve both goals." *Preseault v. ICC, supra*, 853 F.2d at 150. *Accord Glosemeyer, supra*, slip op. at 14.

C. The Strict Scrutiny Test of *Nollan* Does Not Bar Railbanking Under Section 1247(d).

The Preseaults place heavy reliance on *Nollan v. California Coastal Comm'n, supra*, arguing in effect that it narrows the powers of Congress under the Commerce Clause whenever property interests may be affected. But Commerce Clause regulation almost always affects property interests. Thus the Preseaults really invite this Court severely to erode federal power. This is a gross simplification of *Nollan*—a Takings Clause case, not a Commerce Clause case. Nothing in *Nollan* limits the exercise of the police power; it simply conditions the exercise of that power on the payment of compensation in those instances where a taking results.

In *Nollan*, this Court reiterated that reasonable regulation under the police power, under appropriate circum-

²⁰ Even assuming that Congress, when it enacted § 1247(d), was motivated by additional factor outside the scope of the Commerce Clause, it does not follow that the enactment is any less valid. *See, e.g., Heart of Atlanta Motel, Inc. v. United States, supra*, 379 U.S. at 257 (racial segregation, in addition to presenting an obstruction to interstate commerce, also deemed a moral and social wrong); *United States v. Darby*, 312 U.S. 100, 115 (1941) ("[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control").

stances, does not result in a taking even if it adversely affects property interests. One of the tests suggested by the Court is whether the challenged regulation substantially advances legitimate governmental interests. 483 U.S. at 841. Even if this test were applied to section 1247(d) and the Commerce Clause, one could not find a taking. As both the Second and Eighth Circuits have concluded, section 1247(d) efficiently and sensibly serves legitimate federal goals. Further, one of those goals relates directly to railroad regulation—and the property interest asserted by the Preseaults has since 1899 clearly been subject to such regulation.

This highlights another distinction: *Nollan* involved the California Coastal Commission's attempt, solely through use of its police powers, to obtain an easement of access across a beachfront lot that this Court clearly understood to be previously unencumbered by any public servitude.²¹ The *Nollan* opinion states that "[w]e have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." 483 U.S. at 831 (emphasis added; internal quotations omitted). *Nollan* pointedly distinguished both *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (property already opened by owner to the general public) and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) ("affected by traditional doctrines regarding navigational servitudes"). 483 U.S. at 832 n.1. Moreover, in *United States v. Cherokee Nation*, 480 U.S. 700 (1987)—a case decided in the same term as *Nollan*—this Court reiterated the traditional doctrine that action taken by Congress under the Commerce Clause to promote navigation

is not an invasion of any private property rights in the stream or the lands underlying it, for the damage

²¹ In *Nollan*, only the portion of the beach seaward of the mean high tide line was in the public domain. 483 U.S. at 827.

sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

480 U.S. at 704.²² Accordingly, the Court rejected the need for a balancing test to evaluate taking claims arising out of assertion of the navigational servitude. *Id.*

The parallel to the present case is *Cherokee Nation*, not *Nollan*.²³ Almost 90 years ago, the strip of land in which the Preseaults claim reversionary rights was incontrovertibly appropriated to a dominant public use that carried with it the potential for extensive Commerce Clause regulation. At that time, the property owners from whom the Preseaults claim succession were paid the full measure of just compensation demanded by the Takings Clause. Because the railbanking now at issue is incidental to the original appropriation, the case is readily distinguishable from those in which government attempts to restrict use and enjoyment of previously unencumbered property solely through exercise of the police power, without payment of compensation.

²² The Court in *Cherokee Nation* emphasized that the navigational servitude is dominant, regardless of whether or not the riparian owner holds fee simple title to the riverbed. 480 U.S. at 704 n.3, (citing *United States v. Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596 (1941)). See also *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 64 (1913) (interest of a riparian owner in the submerged lands in front of uplands bounding on a public navigable river is a "bare technical title").

²³ The similarity between riparian owners along public waterways and owners of lands abutting public highways by land was explicitly noted in *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945).

II. THE PRESEALTS HAVE NOT BEEN DEPRIVED OF ANY PROPERTY INTEREST.

A. The Character of Railroads as Public Highways Subordinates Any Reversionary Claims in Their Rights-of-Way to a Dominant Public Servitude.

From the earliest days of the industry, railroads have been recognized as a type of public highway by this Court and the courts of Vermont. "[A] railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation." *Cherokee Nation v. Southern Kan. Ry.*, 135 U.S. 641, 657 (1890). See also *Armington v. Town of Barnet*, 15 Vt. 745, 750 (1843). It follows "that property, taken for [a railroad's] use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway" *White River Turnpike Co. v. Vermont Cent. R.R.*, 21 Vt. 590, 594 (1849). See also *In re Debs*, *supra*, 158 U.S. at 589-91. The adaptability of railroad rights-of-way to other transportation uses also has been recognized by federal statutes that long predate section 1247(d).²⁴

Regulation of the discontinuance and abandonment of viatic easements used by the public is deeply rooted

²⁴ Although a right-of-way grant to a railroad company under the General Railway Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (codified as amended at 43 U.S.C. §§ 934 *et seq.*), has been construed as conveying an easement rather than the fee (see *Great N. Ry. v. United States*, 315 U.S. 262, 272 (1942)), it is generally recognized as a special form of easement encompassing other viatic uses (see *Idaho v. Oregon S.L. R.R.*, *supra*). Indeed, Congress has specifically authorized railroads to convey portions of rights-of-way acquired under the 1875 Act to states and their political subdivisions for highway purposes. See 23 U.S.C. § 316; 43 U.S.C. § 913. And Congress has provided that the rights-of-way may be appropriated to any "public highway" use within one year of a judicial

in Anglo-American law. At common law, a highway could be discontinued only by license of the king, obtained after an inquest upon a writ of *ad quod damnum*. *The King v. Warde and Lyme*, Cro. Car. 266, 79 Eng. Rep. 832 (K.B. 1632).²⁵ In this tradition, it has been black letter Vermont law for almost 175 years that the issue of reversionary rights in public highways cannot arise until completion of statutory procedures regulating discontinuances. See *Capital Candy Co., Inc. v. Savard*, 135 Vt. 14, 16, 369 A.2d 1363, 1365-66 (1976) and cases cited therein; *Fisher v. Beeker*, 1 Brayt. 75 (Vt. 1816). See also *infra* note 39.

Vermont law has long protected railroad rights-of-way against inadvertent loss from adverse user (see Vt. Stat. Ann. tit. 30, § 705 (1986)), in the same manner as it does other public highways (see Vt. Stat. Ann. tit. 19, § 1102 (1987)) and "lands given, granted, sequestered or appropriated to a public, pious or charitable use, or . . . belonging to the state" (see Vt. Stat. Ann. tit. 12, § 462 (1973)). Prior to the Transportation Act of 1920, state legislatures (as well as regulatory bodies created by state legislative authority) were acknowledged to have considerable power to regulate discontinuance of service by railroads, not only because of the railroads' "public highway" character but because of their "common carrier" obligations to the public. See, e.g., *Missouri P. Ry.*

decree or congressional declaration of abandonment. 43 U.S.C. § 912.

²⁵ Cf. *Dawes v. Hawkins*, 8 C.B.N.S. 848, 858, 141 Eng. Rep. 1399, 1403-04 (1860):

"It is also an established maxim,—once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute.

v. Kansas, 216 U.S. 262 (1910) (upholding state railroad commission order requiring railroad, over its objectives, to run a regular passenger train between points within state).²⁶ In a case involving a railroad abandonment alleged to have occurred in Vermont prior to the 1920 Act, the Second Circuit (Learned Hand, J.) concluded that a railroad "could not, without the consent of the state, abandon any part of its franchises, keeping the rest." *Town of Readsboro v. Hoosac Tunnel & W. R.R.*, 6 F.2d 733, 736 (1925).

Always inherent in "public highway" status is the possibility of adaptation to new public uses:

The power of the public over highways is not confined to their use for the sole purpose of travel. Many things may be done therein for the promotion of the public convenience and health, such as laying water pipes, constructing drains and sewers, making reservoirs, and many other acts which the public may require; and when these acts are done by the public authorities in a judicious manner and with proper care, having reference to the rights of adjoining proprietors, and the owners of the fee of the land, if such proprietors are incidentally affected injuriously thereby, or the owner of the fee sustains a technical damage, the law furnishes no remedy therefor.

West v. Bancroft, 32 Vt. 367, 371 (1850). See generally Vt. Stat. Ann. tit. 19 § 1111 (1987) (permits for incidental uses of highway rights-of-way) and Vt. Stat. Ann. tit. 30, §§ 2501-30 (1986) (telegraph, telephone and electric wires along highways and railroads).²⁷ Because of

²⁶ The Vermont legislature created a Board of Railroad Commissioners in 1886 Vt. Acts No. 23. As with its Kansas counterpart, the Vermont board was empowered to take legal action against railroads which evaded their responsibilities under applicable charters and statutes. *Id.*, § 7.

²⁷ At the time of the Rutland-Canadian condemnation, the State, through its general railroad law, explicitly reserved an option to

this doctrine, the Vermont Supreme Court has recognized that the interest taken in a railroad condemnation is not confined strictly to the railroad purpose immediately intended, but carries inherent in it rights in favor, among others, of electric light companies. *Proctor v. Central Vt. Pub. Serv. Corp.*, 116 Vt. 431, 433, 77 A.2d 828, 830 (1951) (conversion of railroad right-of-way to electrical transmission corridor). Cf. *Brainard v. Missisquoi R.R.*, 48 Vt. 107 (1874) (conversion of plank road right-of-way to railroad right-of-way). Accordingly, the Preseaults' Takings Clause claim does not rest on a solid state law foundation.

Given this Court's admonition that the operation of the Commerce Clause—no less than the common law of Vermont—"extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation" (*In re Debs*, supra, 158 U.S. at 591), railbanking and interim trail use are appropriate measures under the auspices of the Commerce Clause, as they would be under direct state regulation.

B. The Condemnees From Whom the Preseaults Claim Succession Were Awarded Just Compensation for the Indeterminate and Exclusive Occupancy of Lands Within the Railroad Survey, as Well as For Any Severance Damages to Their Remaining Lands Not Taken.

Even assuming, *arguendo*, the correctness of the Preseaults' contention that the Rutland-Canadian's 1899 condemnation proceeding²⁸ took an easement over the condemned lands rather than the fee interest, it does not

convert the railroad and its rights-of-way to public ownership. See Vt. Stat. § 3746 (1894), Br. Op. at 1a.

²⁸ The commissioners' award to the landowners from whom the Preseaults claim succession is reproduced in Br. Op. at 7a-9a. The relevant Vermont Statutes under which the condemnation occurred are reproduced in Br. Op. at 3a-6a (Rutland-Canadian charter) and Br. Op. at 1a-2a (general railroad condemnation statutes, as in effect in 1899).

follow—as the Preseaults appear to assume—that there would have been any diminution in the amount of damages awarded to the owners of lands crossed by the railroad:

[W]hen land is taken for such purposes as a highway or a railroad (which require a permanent and substantially exclusive occupation of the surface), the distinction between a taking of the fee and of the easement has no practical application in the determination of the compensation to be assessed for the land actually taken. While the damages to the owner's remaining land may be less if the use of the land taken is limited by the nature of the easement, the interest remaining in the owner of the fee in the land taken is in such a case of nominal value, and he is awarded the same measure of compensation for the land actually taken as if the fee was acquired by the condemning party, namely, the full market value of the land.

4 J. Sackman, Nichols on Eminent Domain § 12.41[2] (rev. 3rd ed. 1985). See also *Sanborn v. Village of Enosburg Falls*, 87 Vt. 479, 484, 89 A. 746, 748 (1914) (“subjection of land to an easement of the character of a highway is a taking as much as though the absolute title passed”); 2 H. Wood, The Law of Railroads 902 (H. Minor 2d ed. 1894) (“[t]he title acquired is an easement, but it is an easement in the nature of a fee, and in the assessment of damages no difference is made because of the reversionary right”); E. Pierce, A Treatise on the Law of Railroads 159 (1881) (“[t]hough only an easement is taken for public use, no deduction is made, in practice, in the assessment of damages for the reversionary right”).²⁹

²⁹ Cf. *United States v. Chicago, M., St. P. & P. R.R.*, *supra*, 312 U.S. at 596 (title to bed of stream under local law not controlling since in any case the rights of the title holder are subordinate to the Commerce Clause powers of the federal government in respect of navigation).

As to so-called “severance damages” (i.e., the loss in value of that portion of the condemnee's lands not actually taken),³⁰ there is no more intrusive appropriation than for a railroad. Although the owners of lands along an ordinary public highway are said to enjoy a variety of abutters' rights (most notably a right of reasonable access to and from the highway and their adjoining lands),³¹ a railroad, from a property law aspect, is more akin to a modern limited access highway. Accordingly, except to the degree mitigated by explicit statutory or contractual provisions for farm and other private crossings,³² abutters along a railroad lost—and were compensated for—all rights of access to and across the lands within the boundaries of the railroad. *Jackson v. Rutland & B. R.R.*, 25 Vt. 150, 159 (1853) (railroad may exclude all concurrent occupancy by former owners, “in any mode and for any purpose”). *Accord Connecticut & P. Rivers R.R. v. Holton*, 32 Vt. 43, 47 (1859); *Troy & B. R.R. v. Potter*, 42 Vt. 265, 274 (1869). In sum, as the Supreme Court of Ohio has put it, “[t]here can be no greater burden on property than that which results from [a railroad's] appropriation of a right to exclusive use.” *State ex rel. Fogle v. Richley*, 55 Ohio St.2d 142, 146, 378 N.E.2d 472, 475 (1978). See also *State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 545 (Minn. 1983), *cert. denied*, 463 U.S. 1209

³⁰ Whether land is taken for a railroad right-of-way by agreement or by compulsory proceedings, it is presumed that incidental damages were considered in fixing the compensation. *Libby v. Canadian P. Ry.*, 82 Vt. 316, 320, 73 A. 593, 594-95 (1909).

³¹ See generally 3 J. Sackman, Nichols on Eminent Domain § 10.221 (rev. 3rd ed. 1985); *Abell v. Central Vt. Ry., Inc.*, 118 Vt. 189, 102 A.2d 847 (1954).

³² The lease from the State and VTR to the City recites that it is subordinate to existing crossing and utility agreements and requires the City, during the period of interim trail use, to maintain overpasses, underpasses, fences, etc. See lease excerpts reproduced in Br. Op. at 17a-24a.

(1983) (use of railroad right-of-way for recreation trail consistent with purpose for easement was originally acquired and imposes no additional burden on servient estates); *Faus v. City of Los Angeles*, 67 Cal.2d 350, 361, 62 Cal. Rptr. 193, 200, 431 P.2d 849, 856 (1967) (no additional burden from substitution of paved highway and motor bus service for electric railway). Furthermore, the ICC recently made a specific finding that interim trail use under section 1247(d) does not burden abutting landowners.³³

III. SECTION 1247(d) DOES NOT WORK A TAKING.

The general framework for examining the question of whether a regulation of property amounts to a taking requiring payment of just compensation has been firmly established by this Court:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead*, [369 U.S. 590, 594 (1962)]. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion of government, see e.g., *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transp. Co. v. City of New York, *supra*, 438 U.S. at 124. See also *Hodel v. Irving*, 481 U.S. 704,

³³ *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13), slip op. at 3 n.4, 5-6 & 6 n.9 (ICC, May 18, 1989; served May 26, 1989) (rejecting petition for rulemaking on ground of no evidence of adverse impacts on abutters from interim trail use; instead, evidence pointed to benefits).

714 (1987), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Kaiser Aetna v. United States*, *supra*, 444 U.S. at 175. In addressing the applicability of the Takings Clause, the Court has stated that it is "mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto*, *supra*, 467 U.S. at 1001 (citations omitted).

Respondents submit that the Preseaults' Takings Clause argument, analyzed under this framework, fails.

A. There Cannot Be Any Reasonable, Investment-Backed Expectation of a Right to Assert Reversionary Claims in Railroad Rights-of-Way Without Regard to the Possibility of Governmental Regulation.

The Preseaults appear to argue that, but for the intervention of federal regulation, removal of tracks from the former Rutland-Canadian right-of-way would have operated as an abandonment, thus entitling them to automatic reversion of the right-of-way under state law and, further, that this expectancy of reversion was so certain as to implicate the protection of the Takings Clause.

This "bursting bubble" theory of railroad easements is, however, demonstrably fanciful. Even in the nineteenth century, adaptation of a viatic easement to accommodate new public uses was understood not to trigger an abandonment:

The grant of a right to take land 'for the purposes of a railroad' authorizes the taking of only an easement, leaving the fee with the owner to whom the right of possession reverts on cessation of the public use; and this is the limited interest usually given by statutes authorizing the condemnation of land for

railroads. The property is, however, to be deemed taken for a public use itself, rather than for the peculiar use and enjoyment by the party to whose possession it passes. It does not therefore revert to the owner upon a mere transfer of the railroad to another company, nor upon its appropriation to another similar public use.

E. Pierce, *A Treatise on the Law of Railroads* 158 (1881). The adaptation doctrine was thoroughly incorporated into the common law of Vermont upon which the Preseaults profess to rely. For example In *Brainard v. Missisquoi R.R.*, *supra*, the Vermont Supreme Court squarely rejected a landowner's contention that substitution of a railroad for a plank road somehow "annihilated" the easement originally condemned by the plank road company. 48 Vt. at 114. The court explained:

[W]hen the railroad company regularly located its road over the plank road, it became invested with all the rights that the plank road company had in the premises over which it ran; and the plank road company having paid the plaintiff for the rights that they acquired therein, the railroad company is under no obligation, either legal or equitable, to pay the plaintiff therefor a second time.

*Id.*³⁴ See also *Proctor v. Central Vt. Pub. Serv. Corp.*, *supra* (conversion of railroad right-of-way to electri-

³⁴ Similar results were reached in other jurisdictions in leading cases involving conversion of canal beds to railroad use. See, e.g., *Hatch v. Cincinnati & I. R.R.*, 18 Ohio St. 92, 121-22 (1868) ("The general purposes to which the easement was and is applied are the same; to wit, the purposes of a public way, to facilitate the transportation of persons and property") and *Chase v. Sutton Mfg. Co.*, 58 Mass. (4 Cush.) 152 (1849):

[W]here, under the authority of the legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterwards the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into

cal transmission line corridor); *Armington v. Town of Barnet*, *supra* (conversion of turnpike to public highway, with damage award to turnpike company for the value of the franchise taken). Moreover, it is quite clear that neither nonuser nor physical removal of tracks automatically precipitates reversion. In *Stevens v. MacRae*, 97 Vt. 76, 80, 122 A. 892, 894 (1923), the Vermont court held that "[t]he mere lapse of time and non-user for railway tracks for the length of time shown by the record [20 years] did not in themselves operate in law as an abandonment of possession."³⁵

Nor is there anything peculiar about leasing a railroad right-of-way to a trail sponsor that could reasonably be said to defeat investment-backed expectations on the part of reversionary claimants.³⁶ The Vermont Supreme Court always has recognized the propriety of a railroad's leasing a part of its roadway, "if it does not thereby cripple its efficiency in the discharge of its duties to the public." *Bacon v. Boston & M. R.R.*, 83 Vt. 421, 437, 76

a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes.

58 Mass. (4 Cush.) at 167-68.

³⁵ The *Stevens* holding is consistent with the general rule of Vermont property law that "mere nonuse, no matter how long, will not serve to defeat an easement." *Timney v. Worden*, 138 Vt. 444, 447, 417 A.2d 923, 925 (1980). Or, as stated in *Sabins v. McAllister*, 116 Vt. 301, 76 A.2d 106 (1950):

[T]o establish an abandonment there must be, in addition to non-user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.

116 Vt. at 307-08, 76 A.2d at 109.

In Vermont, the fact that an easement resulted from a condemnation rather than from a grant by deed does not mean that an abandonment is triggered any more easily. Cf. *Capital Candy Co., Inc. v. Savard*, *supra*, 135 Vt. at 16-17, 369 A.2d at 1366.

³⁶ Excerpts from the lease from the State, joined by VTR, to the City appear in Br. Op. at 17a-24a.

A. 128, 134 (1910) and cases cited therein. Land leased by a railroad remains in the railroad's constructive possession *vis-a-vis* abutting landowners and is not deemed to have been abandoned. *Rutland R.R. v. Chaffee*, 71 Vt. 84, 90, 42 A. 984, 986 (1899). Cf. *Grand Trunk R.R. v. Richardson*, 91 U.S. 454, 468 (1875) (a railroad has exclusive control of all land within the limits of its roadway and, while not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, it may license the erection of buildings for its convenience and the convenience of others) (case involving Vermont law).³⁷ Under section 1247(d), a right-of-way leased for interim trail use remains subject to plenary ICC jurisdiction (including the possibility of requiring the property's availability for resumption of railroad service). Furthermore, in 1982, the Vermont legislature specifically directed that, following cessation of railroad operations, title to publicly-owned railroad rights-of-way should be retained "for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes." Vt. Stat. Ann. tit. 30, § 711 (1986).³⁸ In sum, the impact of section 1247(d)—and specifically its impact in the present case—is part and parcel of governmental regulation which is long-standing and so pervasive as to defeat any reasonable investment-backed expectations of reversion.

³⁷ In 1984 Vt. Acts (1983 Adj. Sess.) No. 207 (one in a series of statutes going back to the State's 1964 purchase of sections of the Rutland Railway), the Vermont legislature renewed the authority of the Secretary of Transportation, as agent for the State, to enter into leases of the former Rutland Railway properties. This authority has been carried forward in Vt. Stat. Ann. tit. 5, § 3406(a) (1988), Br. Op. at 26a.

³⁸ Since the ICC's decision in this case, the Vermont legislature has further endorsed leasing of State-owned railroad property that has been railbanked. See Vt. Stat. Ann. tit. 5, § 3408 (1988), Br. Op. at 25a-26a.

The analogy to Vermont highway law—the putative source of the Preseaults' reversionary claims³⁹—also discredits their contention that Vermont law, by creating an automatic expectancy of reversion to abutters, presents an impediment to placing railroad rights-of-way in trail status. Under Vermont highway law (currently codified at Vt. Stat. Ann. tit. 19, § 775 (1987), Br. Op. at 27a-28a), there is a practical remedy that avoids the Hobson's choice of maintaining under-utilized highways or suffering their abandonment and irrevocable loss to the public. Section 775 allows a local government to designate a discontinued highway as a trail, in which case the right-of-way is continued at the same width. Although such trails remain public and open to travel at the user's risk, the local government, for the duration of trail classification, is relieved of responsibility for maintenance. See Vt. Stat. Ann. tit. 19, §§ 301(8), 302(a)(5), 310(c) (1987). In upholding a conversion to trail status under this statute, the Vermont Supreme Court has held that the conversion does not entitle abutting landowners to compensation. *Perrin v. Town of Berlin*, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980).⁴⁰

³⁹ See *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 318 A.2d 652 (1974).

Title to discontinued highways is specifically addressed by the first two sentences of Vt. Stat. Ann. tit. 19, § 775 (1987):

If the discontinued highway is not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side.

(Emphasis added.)

⁴⁰ It should be noted that many of Vermont's highway rights-of-way are of even greater antiquity than their railroad counterparts. See, e.g., *Pidgeon v. Vermont State Transp. Board*, 147 Vt. 578, 522 A.2d 244, 245 (1987) (segment of U.S. Route 7 laid out in 1816.). Carried to conclusion, the Preseaults' Takings Clause

Although the Preseaults seem to set great store by their claim that postponement of their reversionary claim results from recent federal regulation under the Commerce Clause, this hardly strengthens their argument for compensation. *First*, the Preseaults' argument ignores the fact that federal abandonment regulation typically "postpones" reversions for an indefinite period. Such postponement is an obvious effect on such regulation. Railbanking, as the ICC indicated in a recent policy statement,⁴¹ is similar to an ICC order authorizing "discontinuance of service" but not abandonment. The only difference is that under section 1247(d) the costs of railbanking are shifted to the trail sponsor. *Second*, even if section 1247(d) were fundamentally "new," this Court long ago emphasized in *Louisville & N. R.R. v. Mottley*, *supra*, that those who do business with railroads are held to do so upon the basis and with the understanding that Congress, under the Commerce Clause, may make changes in applicable law:

The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value.

219 U.S. at 482. Given the history of pervasive governmental regulation of railroading, the Preseaults' claim to reversion under state law, as they conceive it to have existed at the moment of the 1899 condemnation, simply cannot be entertained seriously. As this Court noted in

arguments lead to the mischievous result that any change in use not explicitly foreseen when a highway was first laid out—for instance, increases in truck weight limits or the accommodation of new utilities such as cable television or fiber optics—would trigger the requirement to pay additional compensation.

⁴¹ Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (Feb. 24, 1989).

United States v. Locke, 471 U.S. 84 (1985), a case involving forfeiture of unpatented mining claims on federal lands:

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate objectives, the legislature acts within its powers in imposing such new constraints or duties.

* * * *

The power to qualify existing property rights is particularly broad with respect to the 'character' of the property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, [citation omitted], we have recognized, that these interests are a 'unique form of property.' [Citation omitted.] The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms upon which the public lands can be used, leased, and acquired.

471 U.S. at 104-05.⁴²

B. The Preseaults Have Failed to Demonstrate Any Reasonable Probability That They Have Suffered an Economic Impact Sufficient to Trigger the Takings Clause.

As the Court noted in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, *supra*, "our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property. . . ." *Id.*, 480 U.S. at 497. The Vermont re-

⁴² The Court in *Locke* noted that legislatures are free to enact substantive changes affecting common law rules on abandonment of property. 471 U.S. at 106 n.15.

spondents submit that such a comparison in this case exposes the Preseaults' claim for what it is—a stubborn attempt to convert the possibility of a future windfall into an immediate right to be compensated a second time for the consequences of a taking that occurred long ago.

Assuming—as the Preseaults contend—that the Rutland-Canadian took an easement in 1899 and, further, that the Preseaults have succeeded to reversionary rights left in the original condemnees, it still does not follow that application of section 1247(d) has had any economic impact on the Preseaults. In Vermont (as elsewhere), a railroad easement is the practical equivalent of a fee interest. *Troy & B. R.R. v. Potter, supra*, 42 Vt. at 274; *Jackson v. Rutland & B. R.R., supra*, 25 Vt. at 159; *Connecticut & P. Rivers R.R. v. Holton, supra*, 32 Vt. at 47. While in the exercise of an easement, a railroad has the “sole and exclusive possession of the land.” *Troy & B. R.R. v. Potter, supra*, 42 Vt. at 274. Because a railroad easement leaves the railroad—not the nominal owner of the fee—with the exclusive use and occupancy of the land, the “physical occupation” test of *Loretto v. Teleprompter Manhattan CATV Corp., supra*, is ill-suited to evaluating the Preseaults' takings claim. Instead, the focus must be on whether railbanking and trail use are subsumed within the dominant servitude of railroad use. Cf. *United States v. Cherokee Nation, supra*, 480 U.S. at 704 (navigational servitude dominant no matter how question of riverbed ownership resolved). Accordingly, reversionary claims can be only of nominal value prior to a railroad's final abandonment.⁴³

⁴³ To the extent that reversionary claimants also may have a present interest in a railroad right-of-way (as, for example; where an abutter has the right to a private crossing), the effect of § 1247(d) is completely benign: the trail sponsor simply steps into the shoes of the railroad. See, e.g., Br. Op. at 21a (“property herein leased is subject to a number of utility and crossing agreements”).

But abandonment of a railroad cannot occur “automatically.” Since 1920, abandonment of rail corridors has been subject to comprehensive federal regulation.⁴⁴ 49 U.S.C. § 10903, in relevant part, provides that

[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Empowered by this delegation of Commerce Clause jurisdiction, the ICC may decline to authorize an abandonment and instead order retention of a line to meet the present or future public convenience and necessity, or may place conditions on the abandonment.⁴⁵ Under a companion statute, 49 U.S.C. § 10905, the ICC may compel transfer of a line to another party willing to provide continued rail service. Lastly, under 49 U.S.C. § 10906, the ICC may condition abandonment on continued non-rail public use of a corridor. For these reasons, the ICC's jurisdiction over abandonment issues has been described as “exclusive and plenary.” *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., supra*, 450 U.S. at 321.

Moreover, until the ICC authorizes an abandonment, state law relating to when a railroad is abandoned, and when (or if) the right-of-way reverts, is preempted. *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 164-66

⁴⁴ As discussed *supra* at 23-24, railroad abandonments formerly were regulated by the states. Under state charters and regulatory statutes, abandonments were rarely permitted. The 1920 Act, if anything, enhanced the ability of carriers to abandon uneconomic lines that could be shown to burden interstate commerce.

⁴⁵ Indeed the State's acquisition of this railroad more than 25 years ago was aided by the ICC's imposing such a condition on the Rutland-Canadian's successor company. *Rutland Ry. Corp.—Abandonment of Entire Line, supra*, 317 I.C.C. at 424-25.

(5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967). Reversionary claimants have no interest to assert until the ICC authorizes abandonment. *Louisiana & A. R.R. v. Bickham*, 602 F. Supp. 383, 384 (M.D. La. 1985), *aff'd*, 775 F.2d 300 (5th Cir. 1985).⁴⁶ As the court of appeals recognized below, "state property law, where it concerns railroad rights-of-way, operates only subject to the ICC's plenary authority to regulate railroad abandonments." *Preseault v. ICC*, *supra*, 853 F.2d at 150.⁴⁷ Section 1247(d) has become part of this regulatory matrix:

The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus petitioners' reversionary interest, if any, is not postponed any more by operation of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction.

Preseault, *supra*, 853 F.2d at 151.⁴⁸

⁴⁶ An ICC abandonment order is not, however, conclusive as to whether a right-of-way has been abandoned under state property law since a railroad may decide to use a right-of-way for railroad purposes that fall outside ICC jurisdiction (for example, rapid transit, industrial sidetracks or car storage). See, e.g., *Idaho v. Oregon S.L. R.R.*, 617 F. Supp. 213 (D. Idaho 1985) (line not abandoned under common law principles where, after issuance of ICC abandonment order, railroad continued to pay taxes on the rights-of-way, kept track and fixtures in place and used right-of-way as side track and for storage of railroad cars).

⁴⁷ This is quite consistent with Vermont law governing reversionary claims in highways. As explained *supra* at 23, such claims cannot be asserted until completion of statutory discontinuation proceedings.

⁴⁸ Cf. *United States v. Cherokee Nation*, *supra*, 480 U.S. at 704 ("damage sustained [results] from the lawful exercise of a power to which the interests of riparian owners have always been subject").

IV. ASSUMING, *ARGUENDO*, THAT SECTION 1247(d) COULD RESULT IN A TAKING, THERE IS A JUST COMPENSATION REMEDY THAT OBTVIATES ANY CONSTITUTIONAL PROBLEMS.

The Takings Clause declares that private property shall not be taken "for public use without just compensation." However, "[i]t does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken." *Cherokee Nation v. Southern Kan. Ry.*, *supra*, 135 U.S. at 659. As this Court explained in *Ruckelshaus v. Monsanto Co.*, *supra*:

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, n. 18 1457, (1949). The Fifth Amendment does not require that compensation precede the taking. *Hurley v. Kincaid*, 285 U.S. 95, 104, (1932). Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491. *United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine"); *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21 (1940).

. . . .

In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Con-

stitution.' " *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974) (emphasis in original).

467 U.S. at 1016-17 (footnotes omitted).

On the strength of *Hodel v. Irving*, *supra*, the Preseaults argue that the Tucker Act remedy cannot be presumed to be available. Pet. Br. at 32-33. This contention is meritless, however. *Hodel* did not allude to availability of the Tucker Act for the simple reason that the need to do so was not present: the United States never argued that the Tucker Act applied and no one suggested that it did.

In the section 1247(d) litigation, by contrast, the availability of the Tucker Act remedy repeatedly has been represented by counsel for the various federal parties and confirmed by the analysis of the court of appeals in *Glosemeyer*, *supra*, slip op. at 19. Moreover, the ICC, on remand from *National Wildlife Fed'n v. ICC*, *supra*, issued a policy statement confirming that the Tucker Act was available to provide just compensation should any particular application of section 1247(d) result in a taking. Rail Abandonment; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (Feb. 24, 1989).

V. THE PRESEALTS' DUE PROCESS CLAIMS ARE WITHOUT MERIT.

To the extent that the Preseaults attack section 1247(d) on the ground that it violates the Due Process Clause, their challenge fails.

Similar arguments were considered and rejected in both *Glosemeyer*, *supra*, slip op. at 10-11, and *National Wildlife Fed'n v. ICC*, *supra*, 850 F.2d at 702 n.12. In both instances, the reviewing courts held that those challenging section 1247(d) must overcome a presumption of constitutionality and demonstrate that "the legislature has acted in an arbitrary and irrational way." See *National*

R.R. Passenger Corp., 470 U.S. 451, 472 (1985), quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

As shown above at 16-19, Congress acted rationally in enacting section 1247(d), thus allowing postponement of rail abandonments and encouraging interim trail use, both in furtherance of the statute's railbanking purpose. Accordingly, the Preseaults' claim under the Due Process Clause also must fail.⁴⁹

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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⁴⁹ Railroadings is notoriously infertile ground on which to mount a due process challenge to governmental regulation; See, e.g., *National R.R. Passenger Corp. v. Atchison T. & S.F. Ry.*, *supra*, 470 U.S. at 466-68 ("atmosphere of pervasive prior regulation") *Louisville & Nashville R.R. v. Mottley*, *supra*, 219 U.S. at 482. (agreement with railroad "must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value").

REPLY

BRIEF

AUG 26 1989

JOSEPH F. SPANIOLO, JR.
CLERK

No. 88-1076

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Supreme Court of the United States

OCTOBER TERM, 1989

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Petitioners,

vs.

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CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The briefs filed by the Respondents and their numerous Amici Curiae are noteworthy as much for what they do *not* say as for what they do. Fundamental issues raised in the Property Owners' brief go unanswered — indeed, unmentioned — by the Respondents.

Instead of dealing with the real issues at bench (like the physical invasion of private property interests by unknown numbers of public recreational users and the undeniable fact that the ICC *must* conclude — before authorizing any rails-to-trails conversion — that the right of way is *not* needed for either present or *future* public use, thus rendering the “rail-banking” rationale illusory), the Respondents and their Amici instead present a paean to governmental power, as though proving the existence of governmental power is the end of this case.

But the existence of raw power is the problem, not the answer.¹ Indeed, in cases alleging Fifth Amendment violation, this Court recently underscored the Constitutional restraint on the government's exercise of its power:

“... many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them.” (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304, 321)

¹ The recent decision in *Glosemeyer v. M.K.T. R.R.* (8th Cir 1989) ___ F 2d ___, cited by the Respondents and their Amici, adds nothing to the analysis of the issues, as it contains little analysis. By the time the case at bench is orally argued, a Petition for Certiorari will have been filed in *Glosemeyer*.

1. SETTLED VERMONT LAW ESTABLISHES THAT, BECAUSE OF THE RAILROAD'S ABANDONMENT, THE PROPERTY OWNERS' TITLE IS FEE SIMPLE ABSOLUTE

While the State Respondents again question whether the Rutland-Canadian Railway acquired fee title or merely an easement (State 8, fn 10), they provide no citation to Vermont law which supports their claim to fee ownership. Nor could they. As the law summarized by the Property Owners demonstrates (Pet Br 15, fn 14), Vermont law is clear that the Rutland-Canadian *could* only acquire a limited easement.

Isaac F. Redfield, Chief Justice of Vermont from 1870 to 1884, and a recognized authority on railroad law,² authored a lengthy opinion for the Vermont Supreme Court in *Hill v. Western Vermont Railway Co.* (1859) 32 Vt 68, 77 in which the Court held that a Vermont railroad's charter "... was not intended to give them power to acquire any more land or any greater estate in such land, for the purposes of a road-bed or stations, than was really requisite for such uses under their charter. . . . [I]t is an easement, a right to use the land in a particular mode for a particular purpose, and . . . the estate would cease and the land revert, the moment it was put to any other use than the one designated . . ."³

² See Redfield, *A Practical Treatise Upon the Law of Railways* (1st ed 1857; 2d ed 1858); Redfield, *Leading American Railway Cases* (1st ed 1869; 2d ed 1872).

³ See also Redfield, *Practical Treatise* at 131 (2d ed 1858):

"Questions have sometimes arisen, in regard to the precise title, acquired by a railway company, in lands purchased by them, where the conveyance is a fee-simple. It is certain, in this country, upon principle, that a railway company, by virtue of their compulsory powers, in taking

(continued)

As the Vermont Supreme Court stated with respect to the property in this case, the Rutland-Canadian acquired "... an easement for railroad purposes . . ." (*Trustees of the Diocese of Vermont v. State* [1985] 145 Vt 510, 511)⁴

Under settled Vermont law, the Property Owners have a present interest to possession of the disputed easement area.⁵ The State Respondents' failure to provide authority⁶

(fn. continued)

lands could acquire no absolute fee simple, but only the right to use the land for their purposes."

Thus, while mid-nineteenth century English law may be interesting (see State 23, fn 25), it is irrelevant to the issue before this Court, as the law in Vermont, as in most of the United States, is contrary. (See generally, Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?* [1988] 33 St. Louis U.L.J. 205, 211, 213; *National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694, 703, and ALR annotations cited there.)

⁴ The encyclopedic comment that, because of the severity and indefinite length of a railroad easement, compensation for its acquisition is generally the value of the fee (*e.g.*, State 26) has nothing to do with the interest acquired by the railroad or the interest remaining in the property owner. It means only that the present, discounted value of the right to reacquire full use and enjoyment at an indefinite time in the future is so uncertain as not to be worth valuing at the time of acquisition. That in no way means that now, when the Property Owners are entitled to reacquire full use and enjoyment, their interest may be confiscated.

⁵ The general highway law relied on by the State Respondents (State 22-25) demonstrates the bankruptcy of their position. Highways are regulated by Title 19 of the Vermont statutes; railroads by Title 30. While highway abandonment is a creature of statute, railroad abandonment has always been decided by case law, as described in the Property Owners' Brief (p 15, fn 14). The two transportation modes are subject to different law.

⁶ The State Respondents discuss Vermont case law in a misleading fashion. Thus, while it is literally true that "... *neither nonuser nor*

(continued)

to support their spurious claim to fee title demonstrates that it is only a phantom issue.

2. THE "RAILS-TO-TRAILS" SCHEME IS FACIALLY INVALID BECAUSE IT WAS DESIGNED TO APPLY — AND IS BEING APPLIED — ONLY WHERE PRIVATE REVERSIONARY INTERESTS WOULD PREVENT RECREATIONAL TRAIL USE

The Court of Appeals held that the "rails-to-trails" scheme could *never* be a taking of private property for public use. (Pet App 12-13) The United States refuses to defend the Second Circuit's holding:

"We do not defend the judgment on that rationale, which conflicts with the District of Columbia Circuit's opinion in *National Wildlife* . . ." (Br for Fed Respondents 21, fn 13)

Instead, the Respondents suggest that, because some conversions from railroad use to trail use do not involve private reversionary interests, the statute can only be examined as applied on a case-by-case basis. (Br for Fed Respondents 8, 17-18)

That approach is in error.

As discussed in the Property Owners' Brief (pp 7-8), the reason for the adoption of 16 USC §1247(d) was to override the problem created by state law in those situations where

(fn. continued)
physical removal of tracks automatically precipitates reversion . . ." (State 31; emphasis added), the presence of *both* nonuser and track removal does so. (E.g., *Proctor v. Central Vermont Pub. Services Corp.* [1951] 116 Vt 431, 433-434.) Both are concededly present here.

private reversionary interests would ripen to present rights to possession upon abandonment of railroad use:

"The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." (House Report 98-28 at 8-9)

The ICC has acknowledged this purpose:

"... the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreation use when the rights-of-way have been operated under easements for railroad purposes." (*Rail Abandonments — Use of Rights-of-Way as Trails* [1986] 2 ICC 2d 591, 597 [*Trails Rules*])

The method of accomplishing this goal was to Congressionally attempt to pre-empt state property law which otherwise precluded conversion of abandoned railroad rights-of-way to recreational trails. This pre-emptive action applies only to those situations in which the underlying fee would otherwise revert to private owners:

"... pre-emption, the key feature of the amendment, applies *only* to rights-of-way held and operated under easements, or subject to rights of reversion." (*Trails Rules*, 2 ICC 2d at 599; emphasis added.)

In case any participants in the "rails-to-trails" scheme failed to note the discrete focus of the statute, the ICC told them *not* to seek trail conversion in cases not involving reversionary interests:

"Thus, if a trail proposal involves property owned by the carrier, and the trail developer does not

want to risk losing the right-of-way to restored service, section 1247(d) should not be invoked. Rather, the trail developer should let the railroad consummate abandonment and then purchase or lease the right-of-way from the railroad . . .

"On the other hand, if part or all of the involved right-of-way is held under an easement or reversionary interest, the trail developer would need to invoke section 1247(d) to prevent reversion of the easement property and maintain the integrity of the transportation corridor." (*Trails Rules*, 2 ICC 2d at 599)

The point is straightforward: if the railroad owns the right-of-way in fee, then it has *always* had the ability to sell or lease it to a trail group for any purpose and subject to any conditions of reactivation of rail service to which the parties might agree. The *only* time when the "rails-to-trails" statute is needed is when the railroad owns only an easement subject to reversion when railroad use stops.⁷

Thus, in *all* cases to which the statute applies, the statute has an immediate effect on all reversionary property owners, converting that which became wholly theirs on cessation of railroad use into a public recreational trail.

The facial invalidity of the "rails-to-trails" scheme is ripe for adjudication, and the Second Circuit's analysis was erroneous.

⁷ The reason why neighboring property owners have standing to ask the ICC to declare a railroad line abandoned (*Thompson v. Texas Mexican R. Co.* [1946] 328 US 134, 145) is to protect and enforce the reversionary rights they have in the right-of-way (e.g., *Modern Handcraft, Inc.* [1981] 363 ICC 969).

3. THIS IS A PHYSICAL INVASION CASE. PROPERTY WHICH WOULD OTHERWISE BE PRIVATE IS SUBJECTED BY STATUTE AND ICC ACTION TO USE BY UNKNOWN AND UNINVITED MEMBERS OF THE GENERAL PUBLIC

Despite the reluctance of the Respondents and their Amici to acknowledge it, this is a physical invasion case.

As briefed elsewhere, Vermont law provides that, when a railroad right-of-way easement is abandoned,⁸ full use and enjoyment of the property are returned to the underlying fee owner. It is undisputed that no railroad use has been made of this easement since 1975, when the tracks and ties were removed from the easement.

Thus, absent the attempted pre-emptive effect of 16 USC §1247(d), the Property Owners have a present right to possess the easement area. However, because of 16 USC §1247(d), the Property Owners face the prospect of unknown numbers of unknown members of the general public trespassing on their property. That is as much a physical invasion as was present in *Kaiser Aetna v. U.S.* (1979) 444 US 164 [public access to private marina], *Nollan v. California Coastal Commn.* (1987) 483 US 825 [public access to private beach], or *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419 [cable TV access to private building].

⁸ This Court has defined "abandonment" as follows:

"An abandonment 'is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line . . .'" (*Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.* [1981] 450 US 311, 314, fn 2; emphasis added.)

This Court has described the Fifth Amendment's Taking Clause as providing protection to property owners against "... an interloper with a government license." (*FPC v. Florida Power Corp.* [1987] 480 US 245, 253) In similar fashion, Professor Tribe has described this Court's decision in *Kaiser Aetna* as intended to protect private property owners from "... government-invited gatecrashers ..." (Tribe, *American Constitutional Law* [2d ed 1988] §9-5 at 602)

Those descriptions fit this case like the proverbial glove. Although the Property Owners are entitled to exclusive use and possession of the property (since railroad use long ago terminated) the government has invited and purported to license the public to use the Preseaults' property as though it were public. That the government cannot do without compliance with the Fifth Amendment.⁹

The changed situation created by the statute was aptly described by the Supreme Court of Washington when it responded to arguments almost identical to those being made here by the Respondents and their Amici (*i.e.*, that the "rails-to-trails" scheme has no effect on the Property Owners because they already had a railroad easement on their land):

"Defendants' second contention is somewhat startling. The argument that the statutes are valid because they do not 'eliminate' plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain posses-

⁹ Even with respect to the railroads which it regulates, the ICC cannot compel the donation of a right-of-way to a public agency for some public purpose (*Burlington Northern, Inc. Abandonment* [1972] 342 ICC 446, 453) or delay more than temporarily the issuance of a certificate of abandonment (*Lehigh & N.E.R. Co. v. ICC* [3d Cir 1976] 540 F 2d 71) without violating the Fifth Amendment.

sion of the easements upon railroad abandonment. Under the statutes, they would not." (*Lawson v. State* [Wash 1986] 730 P 2d 1308, 1313)

The "rails-to-trails" scheme is a physical taking of the easement area.¹⁰ As that is done without compensation, the attempted transformation of private property into public property is void.

4. UNAUTHORIZED GOVERNMENTAL ACTION CANNOT BE REDRESSED BY A SUIT FOR COMPENSATION IN THE CLAIMS COURT

In their Brief on the merits, the Property Owners showed that Congress did not authorize any "rail-to-trail" conversions which would lead to the expenditure of any federal funds which had not been appropriated in advance. (Pet Br 26-28) That discussion canvassed this Court's consistent holdings that the Claims Court is available for redress *only* of governmental actions which Congress has authorized. (Pet Br 29-32) If there is no authorization, there can be no

¹⁰ Changing the burden of an easement cannot be done without a new taking, accompanied by compensation appropriate to the new circumstances. The aircraft flight easement cases aptly demonstrate this. (*E.g.*, *Davis v. U.S.* [Ct Cl 1961] 295 F 2d 931 [from B-36 to B-52]; *A.J. Hodges Indus., Inc. v. U.S.* [Ct Cl 1966] 355 F 2d 592 [lower altitude]; *Jensen v. U.S.* [Ct Cl 1962] 305 F 2d 444 [more flights].) The facile assertion that "railbanking" is "incidental to the original appropriation" (State 21) thus evades settled law. The "original appropriation" was for railroad use. Conversion of a right-of-way from an occasional train (or, as here for the past decade and a half, no train at all) to unknown numbers of hikers, bikers, and general revelers is no mere "incidental" change.

compensatory remedy.¹¹

The primary response to this argument comes from the United States.¹² The United States agrees that unauthorized governmental acts cannot be remedied in the Claims Court, but denies the application of that rule in this case:

"Petitioners lastly contend that no Tucker Act remedy exists for unauthorized acts of government officials. That proposition is true, [citation], but not applicable to this case. Petitioners do not contend that the ICC violated some statutory duty in this case. On the contrary, Section 8(d) plainly authorized the Commission to approve the interim use agreement at issue in this case and to deny petitioners' request for abandonment. Petitioners' claim is that the grant of authority under Section 8(d) is unconstitutional, not that the ICC exceeded its authority." (Br for Fed Respondents 22)

That response misstates the Property Owners' argument.

Although the Property Owners *do* challenge the grant of any "rails-to-trails" conversion authority to the ICC, their primary argument is that, assuming *arguendo* the validity of any such grant, Congress *expressly limited* the granted authority to those conversions which would either not require the expenditure of any funds or for which funds had been appropriated in advance. Thus, any conversion which could

¹¹ As the Court of Claims summarized it:

"If, however, the taking is unauthorized, the acts of defendant's officers may be enjoined, but they do not constitute [a] taking effective to vest some kind of title in the government and entitlement to just compensation in the owner or former owner. [Citations.]" (*Armijo v. U.S.* [Ct Cl 1981] 663 F 2d 90, 95)

¹² The State Respondents respond only cursorily (State 39), as do the Amici Curiae.

result in Claims Court litigation was not authorized by Congress, as payment for that trail acquisition would not have been approved by Congress in advance.¹³

Thus, the problem with the Respondents' argument is that it is based on too crabbed an interpretation of the concept of Congressional authorization. Here, the authority granted was strictly limited, so that Congress could keep a rein on the cost of developing recreational trails. Acquisition of a trail which would cost money was not authorized. Indeed, the focus of all the 1983 amendments was on voluntary action. Thus, there could be no successful suit in the Claims Court for compensation.¹⁴

This analysis is confirmed by this Court's decision in *Hooe v. U.S.* (1910) 218 US 322 (cited with approval on the "authorization" issue in the *Regional Rail Reorganization Act Cases*, 419 US at 127, fn 16). In *Hooe*, the Civil Service

¹³ The United States' reliance on the *Regional Rail Reorganization Act Cases* (1974) 419 US 102 (see Br for Fed Respondents 10-14) appears misplaced. There, as this Court stated, withdrawal of the Claims Court remedy was not found because that statute's ceiling on expenditures would "... support the inference that Congress was so convinced that *the huge sums provided would surely equal or exceed the required constitutional minimum* that it never focused upon the possible need for a suit in the Court of Claims." (419 US at 128; emphasis added; see also 419 US at 129, 130.) Here, in sharp contrast, Congress provided *no* sums at all — "huge" or otherwise — while recognizing that its statute would undo settled state property law, thus raising Constitutional takings questions.

¹⁴ The United States' collection of 7 other recent statutes which similarly limit expenditures (Br for Fed Respondents 19, fn 10) reinforces the idea that Congress is now more strictly exerting its Constitutional control over the purse. Nor was the United States able to cite any case under any of those statutes in which, notwithstanding the Congressional limitation on expenditures, judgment in the Claims Court was nonetheless had.

Commission had been established by Congress and authorized to rent quarters. However, the money appropriated for the Commission was not sufficient to pay for the quarters occupied. When the landlord sought compensation for the additional space in the Court of Claims, this Court held that compensation could not be awarded because the *occupation of more space than the appropriation would pay for was not authorized by Congress*. The same is true at bench. Acquisition of easements beyond the authorized funds (here, none) is an action not authorized by Congress.

Congressional denial of funding is all the more striking when compared to the so-called 4R Act, the Railroad Revitalization and Regulatory Reform Act of 1976 (45 USC §801 *et seq.*). As noted by the United States (Br for Fed Respondents 28), the 4R Act *did* authorize some funding for conversion of abandoned rights-of-way to recreational uses. However, when Congress later enacted the "rails-to-trails" scheme in 1983, it consciously denied that spending authority which it had granted in the 1976 statute. Such deliberate Congressional action ought not be ignored because it later appears litigationally expedient to do so.

The Respondents' other argument fares no better. They urge that §101 of the statute does not preclude suit in the Claims Court, notwithstanding its clear prohibition of expenditure of funds not appropriated in advance for the purpose. Why? Because the money to pay Claims Court judgments comes from a *different federal pocket!* (E.g., Br for Fed Respondents 7, 19.) One's mind reels. One would be hard-pressed to conjure up a clearer example of what this Court had in mind in *Nollan* when it condemned evasion of the Fifth Amendment's Taking Clause by governmental "... exercise[s] in cleverness and imagination." (483 US at 841)

The Court of Claims expressed the response clearly:

"... in enacting ... the Tucker Act ... that authorized suits founded on the fifth amendment,

Congress did not strip itself of all control over the obligation of public funds by land takings without condemnation." (*NBH Land Co. v. U.S.* [Ct Cl 1978] 576 F 2d 317, 319)

Congress controls expenditures from *all* sources. It is shocking to claim that a Federal agency may evade express Congressional limitations on spending by reaching into a different pocket through unauthorized action. Attempts to do so have been repeatedly condemned. (*Hooe*, 218 US at 335; *Sutton v. U.S.* [1921] 256 US 575, 579; *Leiter v. U.S.* [1926] 271 US 204; *Southern Cal. Financial Corp. v. U.S.* [Ct Cl 1980] 634 F 2d 521, 524)

The purchase of recreational trails with Federal funds — unless those funds have been specifically authorized in advance — is prohibited, not just unauthorized. There can thus be no Claims Court action.¹⁵ The Property Owners' only remedy is the declaration of invalidity requested.

The Respondents' studied avoidance of *Hodel v. Irving* (1987) 481 US 704 is both inexplicable and bewildering. There, this Court invalidated a statute requiring the escheat of small Indian estates because the statute contained no provision for compensation of the affected property owners. Neither the statute nor its legislative history made any mention of recourse to the Claims Court for compensation.¹⁶

¹⁵ Contrary to the United States' argument, cases such as *Skaw v. U.S.* [Fed Cir 1984] 740 F 2d 932 are not to the contrary. There, Congress expressed its intention to pay (740 F 2d at 938-939), an intention expressly denied here.

¹⁶ It thus cannot be true, as the United States broadly asserts, that it is "settled" that Congressional silence cannot be interpreted as an intention to withdraw Claims Court recourse. (Br for Fed Respondents 16) Of course, in this case, the record is not silent. Congress explicitly forbade any trail acquisitions which could cost money unless that money was expressly appropriated for that purpose in advance.

Rather than remitting the parties to the Claims Court, however, this Court struck down the statute, finding that Congressional silence indicated an intent *not* to permit any compensation. The same is true here. Indeed, because of the Trails Act Amendments' express denial of access to funds which were not expressly appropriated in advance for trail acquisition, the situation at bench seems stronger than that in *Hodel v. Irving*.

In the face of its clarity, the Respondents attempt to trivialize *Hodel v. Irving*. Indeed, the Federal Respondents mention it only in a footnote, denying that it has any application. Why? Because in that litigation, "[t]he United States had interpreted the statute as withdrawing the Tucker Act remedy . . ." (Br for Fed Respondents 20, fn 11) But the after-the-fact litigational posture of counsel for the United States is no basis for the interpretation of Congressional intent. (See, e.g., *Regional Rail Reorganization Act Cases*, 419 US at 132, where this Court rejected "post-passage remarks of legislators" expressed both in Congressional hearings and an Amicus Curiae brief, because the determinative factor is Congressional intent *at* passage of the statute.) Thus, had this Court concluded that the intent of Congress was to provide access to the Claims Court for the Indian victims in *Hodel v. Irving*, nothing that counsel for the United States argued, or failed to argue, in litigation would have changed the result.

The point is straightforward: direct statutory reference to the Claims Court or the Tucker Act is not necessary for this Court to conclude that Congress intended no such recourse. *Hodel v. Irving* permits no other conclusion.

5. THE BEDROCK, FOUNDATIONAL FACT IS THAT *BEFORE* THE ICC CAN AUTHORIZE THE CONVERSION OF ANY RIGHT-OF-WAY TO TRAIL USE, THE ICC *MUST* FIND THAT THERE IS *NO FUTURE RAILROAD NEED* FOR THE RIGHT-OF-WAY

While strenuously urging that the "rails-to-trails" scheme is defensible because it is based on the concept of "banking" railroad rights-of-way for future railroad use, the Respondents studiously avoid one unavoidable fact: *no* conversion to trail use can be authorized by the ICC until *after* the ICC has already concluded that there is *no* future public need for the right-of-way. That is clear with respect to ordinary abandonment petitions under 49 USC §10903, in which approval of abandonment must be accompanied by an ICC finding that the right-of-way is *not* necessary for "... present *or* future public convenience or necessity ..." (emphasis added), as well as approval of *de facto* abandonments under 49 USC §10505(a)(1), in which the ICC must find that the right-of-way "... is not necessary ..." to further Congressional rail transportation policies.

The ICC knows this, even though the brief filed on its behalf by the Solicitor General fails to mention it. As the ICC most recently put it:

"In every Trails Act case, we will *already* have found that the public convenience and necessity permit abandonment (or that regulatory approval is not required under 49 U.S.C. 10505)." (*Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures* [1989] 54 Fed

Reg 8011, 8012, fn 3; emphasis added.)¹⁷

Thus, the way in which the "rails-to-trails" scheme is set up is that unused rights-of-way can be "railbanked," i.e., stockpiled for future railroad use, *only* after the ICC formally finds that the rights-of-way are *not needed* for any future public use.¹⁸ "Railbanking" — the loudly trumpeted "basis" for precluding reversionary owners like Mr. and Mrs. Preseault from using what is rightfully theirs — is thus acknowledged by the ICC to be a pretext.¹⁹ It can be no

¹⁷ Thus, the brief filed on behalf of the ICC is misleading when it blandly repeats the Second Circuit's conclusion that "... the ICC has determined that the right-of-way *may not be abandoned* because it *should be retained* for possible 'future railroad use'." (Br for Fed Respondents 6; emphasis added.)

That is the *opposite* of what the ICC concluded. As the ICC itself said, it *always* finds no future public need when it approves a rails-to-trails conversion. This foundational Second Circuit error was discussed in the Property Owners' Brief (p 12-13), but is ignored by the Respondents.

¹⁸ Whether characterized as abandonment or "discontinuance" (the latter term being offered by the Respondents and their Amici as a less drastic form of cessation of service [e.g., State 34]) is irrelevant. The ICC knows that 16 USC §1247(d) was needed in either event:

"This language, and its legislative history, express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the *discontinuance of rail operations* ..." (Trails Rules, 2 ICC 2d at 600; emphasis added.)

¹⁹ For the first time in this litigation, the United States mentions, in an offhand manner, that trail use *alone* — even if there were no railroad use — would justify this statute under the Commerce Clause. (Br for Fed Respondents 27, 29) No explanation of how the haphazard creation of scattered pieces of recreational trails impact interstate commerce is even attempted. Nor does this argument take into account the legislative history and ICC interpretation which ground the statute on the power to regulate railroads. Nor could there be. If the statute were not related to railroad use, it could not

(continued)

more when the ICC finds that there is no future public need for the right-of-way.

6. ACTION UNDER THE COMMERCE CLAUSE HAS ALWAYS BEEN SUBJECT TO FIFTH AMENDMENT SCRUTINY

The Property Owners and the Respondents agree that the general test for reviewing Commerce Clause action is stated in *Hodel v. Virginia Surface Min. & Reclamation Assn.* (1981) 452 US 264, 268. (See Pet Br 35; Br for Fed Respondents 24.) Where they part company is on the application of that rule to cases in which Commerce Clause action is alleged to take property in violation of the Fifth Amendment's protections.

Thus, the United States accuses the Property Owners of arguing that *Nollan v. California Coastal Commn.* (1987) 483 US 825 "implicitly overruled" *Hodel v. Virginia*. (Br for Fed Respondents 25)

Wrong. There is no conflict between *Hodel v. Virginia* and *Nollan*. *Nollan* merely expands on *Hodel v. Virginia*, as this Court recognized would happen when a Fifth Amendment violation was charged. As this Court concluded in *Hodel v. Virginia*, a court's duty in examining a statute under the Commerce Clause is to determine:

(ftn. continued)
accomplish the goal of overriding state law regarding the abandonment of railroad easements. Only railroad use could prevent reversion. Thus, even if Congress has the power to legislate with regard to recreational trails, that power would achieve nothing in rail abandonment cases. The railroad pretext is essential to the scheme under review.

"... whether Congress, in adopting the Act, exceeded its powers under the Commerce Clause of the Constitution, or *transgressed affirmative limitations on the exercise of that power contained in the Fifth and Tenth Amendments.*" (452 US at 268; emphasis added.)

What the *Nollan* analysis does is to provide the framework for the Fifth Amendment analysis acknowledged as appropriate in *Hodel v. Virginia*. While the heightened scrutiny required by *Nollan* may be of recent vintage, the subservience of the Commerce Clause to the Fifth Amendment is not. As this Court noted more than half a century ago:

"The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law." (*U.S. v. Chicago, M. St. P. & P.R. Co.* [1931] 282 US 311, 327)

Thus, when this Court held in *Hodel v. Virginia* that "the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] must be reasonably related to the end permitted by the Constitution' ..." (452 US at 276, as quoted in Br for Fed Respondents 25), it intended to require consideration of the question whether "the end" was "permitted by the Constitution." Here, the Fifth Amendment precludes "the end" of confiscating private property without compensation.²⁰

²⁰ Nor are the Property Owners alone in their belief that *Nollan* requires a higher standard of judicial scrutiny of statutes and ordinances which take private property. In addition to the commen-

(continued)

It is no answer to simplistically respond that this is a Commerce Clause case, while *Nollan* was a Takings Clause case. (E.g., State 19) As this Court's settled jurisprudence attests, exercise of the Commerce Clause is subject to the restrictions in the Takings Clause.

Because the "rails-to-trails" scheme takes property which, under settled Vermont law, belongs to the Property Owners, the *Nollan* extension of the *Hodel v. Virginia* rule governs this case.

CONCLUSION

The "rails-to-trails" scheme is a transparent attempt by Congress to override and pre-empt settled state property law which forbids transforming abandoned railroad rights-of-way into recreational trails. Conversion had been precluded often enough to cause Congress to believe that trail conversion would not occur. (See *Pollnow v. State Dept. of Natural Resources* [Wis 1979] 276 NW 2d 738; *Schnabel v. County of DuPage* [Ill App 1981] 428 NE 2d 671; *McKinley v. Waterloo R. Co.* [Iowa 1985] 368 NW 2d 131; *Lawson v. State* [Wash 1986] 730 P 2d 1308)

Thus, Congress siezed on the theory that, if it said it was "railbanking" these rights-of-way for possible future rail use, it might evade this settled body of law. But the statutory scheme it established belies the "railbanking" rationalization and exposes it for the fiction which it is: no trail conversion can be authorized by the ICC until *after* the ICC finds that the right-of-way is *not* needed for future railroad use. (49 USC §10903)

(ftn. continued)

tries collected at Pet Br 37-38, see the recent decision of the New York Court of Appeals in *Seewall Associates v. City of New York* (1989) ___ NY 2d ___ (slip op, pp 19-22).

Thus, what is before this Court is a bald effort to transmute private property into public property without the payment of compensation to the underlying fee owners, because Congress was explicit that it wanted no money spent which was not expressly appropriated for trail acquisition.

That type of definitional transmutation cannot be done. As this Court plainly held in *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1012:

"This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* [1980] 449 US 155, 161)

That forbidden transformation is what the "rails-to-trails" scheme is all about. It merits this Court's invalidation, just as the similar scheme in *Hodel v. Irving*.

The Property Owners pray that this Court so hold and that the judgment be reversed.

Respectfully submitted,

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By: MICHAEL M. BERGER
Counsel of Record

Attorneys for Petitioners

No. 88-1076
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Esiquia C. Gonzales being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On August 25, 1989, I served the within PETITIONERS' REPLY BRIEF on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

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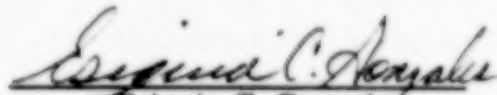
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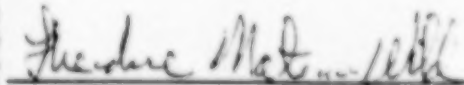
That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioners herein, and that to the best of my knowledge all persons required to be served in said action have been served.


Esiquia C. Gonzales

On August 25, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia C. Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.




Notary Public in and for
said County and State

AMICUS CURIAE

BRIEF

8

JUN 7 1989

JOSEPH F. SPANGL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,
v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA;
STATE OF VERMONT;
CITY OF BURLINGTON; and
VERMONT RAILWAY, INC.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION AND NATIONAL CATTLEMEN'S
ASSOCIATION IN SUPPORT OF PETITIONERS,
J. PAUL PRESEALT AND PATRICIA PRESEALT

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No. 88-1076

In The

Supreme Court of the United States

October Term, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,

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v.

INTERSTATE COMMERCE COMMISSION and
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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36, Pacific Legal
Foundation (PLF) and the National Cattlemen's Associa-
tion (NCA) respectfully submit this brief amicus curiae in

support of petitioners, J. Paul Preseault and Patricia Preseault. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

PLF previously moved for leave to file an amicus curiae brief in support of the Preseaults' Petition for Writ of Certiorari. The motion was granted and the brief filed. Certiorari was granted and amici now submit this brief on the merits.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

NCA is a nonprofit, tax-exempt corporation representing over 230,000 members nationwide. Many NCA members own land subject to railroad easements and hold reversionary rights to the underlying land when railroad use is discontinued or abandoned. The disposition of this case will have a direct impact on those rights.

The opinion below holds that a federal statute which defeats a property interest as recognized under state law does not effect a compensable taking. Amici believe the ruling below is incorrect and poses a serious threat to the integrity of private property rights. Although federal law may clearly preempt state law with regard to the exercise

of property rights, such preemption does not answer the entirely separate question of whether the defeat of otherwise vested property interests constitutes a taking by the federal government for which compensation must be paid. The public interest strongly supports enforcement of the constitutional limitation on federal power presented by the Takings Clause of the Fifth Amendment.

STATEMENT OF THE CASE

This case involves abandoned railroad rights-of-way. Initially, it must be stressed that not all railroad rights-of-way are the same. Sometimes a railroad acquires a right-of-way in fee simple absolute and the railroad is free to use the right-of-way for whatever purposes it sees fit. See generally *National Wildlife Federation v. Interstate Commerce Commission*, consolidated with *Beres v. Interstate Commerce Commission*, 850 F.2d 694, 703 (D.C. Cir. 1988). Other times a railroad may only acquire an easement to pass through private property. Often these more defined "rights-of-way are specifically limited to railroad use and may revert to the original owner (or a successor in interest) if railroad use is discontinued." *Id.*

The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance. As pointed out in *National Wildlife*, "the interest retained by a property owner whose land is subject to a railroad right-of-way will depend upon the language of the instrument conveying, or of the state law creating, that right-of-way and on the applicable state law rules of construction." *Id.* This is consistent with the basic

axiom that property interests are created and defined by state law. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1001 (1984).

In cases where the right-of-way conveyed is a limited easement, state law will also determine the circumstances that trigger the reversion of the right-of-way to the underlying landowner. *National Wildlife*, 850 F.2d at 703. For example, in *Lawson v. State of Washington*, 107 Wash. 2d 444, 730 P.2d 1308, 1311-12 (1986), the Washington Supreme Court stated:

"[U]nder Washington law, when an easement is granted to a railroad through a private conveyance . . . the particular deeds conveying the right of way must be interpreted to determine the scope and duration of the easement granted.

"At common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way the land over which the right of way passes reverts to the reversionary interest holder free of the easement." *Id.* (citations omitted).

Other state courts have similarly developed state law with regard to the circumstances triggering reversion of a railroad easement back to the original grantor or successor in interest. See, e.g., *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 428 N.E.2d 671, 675-78 (1981); *Pollnow v. State of Wisconsin Department of Natural Resources*, 88 Wis. 2d 350, 276 N.W.2d 738 (1979); see also *Chicago, Rock Island & Pacific Railway Company v. Diamond Shamrock Refining & Marketing Company*, 865 F.2d 807, 811-13 (7th Cir. 1988). Similarly, the Vermont state law applicable to the right-of-way in this action recognizes

the reversionary interest of the original grantor. See Petition for Writ of Certiorari (Pet.) at 10-11 n.2 and cites therein.

In the present action Paul and Patricia Preseault are Vermont landowners who claim to hold a reversionary interest in a railroad right-of-way adjacent to their land. *Preseault v. Interstate Commerce Commission*, 853 F.2d 145, 147 (2d Cir. 1988). They claim that under Vermont law, they hold title to the underlying land subject to an easement right-of-way which is specifically limited to railroad use and that when railroad use is abandoned, unencumbered title reverts to them. *Id.* at 150; see also Pet. at 10 n.2. According to petitioners such title reverted in 1975 when Vermont Railway, Inc.¹ removed portions of the track and discontinued rail service over the route. *Id.* at 147; Appendix to the Petition for Writ of Certiorari (Pet. App.) at 50 n.3.

In order to quiet title to the easement, the Preseaults filed a petition to the Interstate Commerce Commission (ICC) seeking a certificate of abandonment of the discontinued rail line. *Preseault*, 853 F.2d at 147. By issuance of a certificate of abandonment, ICC would relinquish jurisdiction over the railroad right-of-way, thereby "bring[ing] its regulatory mission to an end," and allowing the operation of state law for disposition of title to the property. *Hayfield Northern Railroad Company, Inc., and Minnesota v. Chicago and North Western Transportation Company*, 467 U.S. 622, 633-34 (1983).

¹ The railroad right-of-way is owned by the State of Vermont which leased the right-of-way to Vermont Railway, Inc. *Preseault*, 853 F.2d at 147. For ease of reference, amici refer to both entities collectively as "Vermont Railway."

While the Preseault petition was pending before ICC, Vermont Railway and the City of Burlington agreed to utilize procedures available for abandoning railroad use of the line and converting the right-of-way to interim public trail use. *Preseault*, 853 F.2d at 147-48; *see generally* 49 C.F.R. § 1152.29 (1987). Pursuant to the authority in 16 U.S.C. § 1247(d), ICC allowed railroad use of the easement to be discontinued and, in its place, a public trail established. *Preseault*, 853 F.2d at 148.

Despite the fact that rail service is discontinued and the route is effectively abandoned for rail purposes, Section 1247(d) specifies that "such interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Since conversion of a right-of-way from "rails to trails" does not, by statutory definition, constitute an "abandonment," ICC regulatory jurisdiction of the route continues. More significantly, since ICC exercises continuing jurisdiction, the reversionary rights to the right-of-way that would otherwise vest under state law are cut off and prevented from becoming presently possessory.

The petitioners claim, and the court below assumed as true, that use of the right-of-way for a public recreational trail is not within the limited scope of the right-of-way easement. Despite these assumed facts, the Second Circuit concluded, as a matter of law, that the continuing exercise of ICC jurisdiction pursuant to Section 1247(d) cannot result in a taking or postponement of any reversionary interest that the petitioners may possess. *Preseault*, 853 F.2d at 151. In contrast, the petitioners contend

that Section 1247(d), by authorizing use of the right-of-way for public trails, defeats petitioners' property right under state law to regain control over the right-of-way when rail use discontinues. Although Congress has the power to preempt state property law, the effect of that preemption is to redefine and change existing rights in property. The issue presented for this Court's resolution is whether such federal preemption of state created property rights constitutes a taking without compensation in violation of the command of the Fifth Amendment.

SUMMARY OF ARGUMENT

A taking occurs in this case if Section 1247(d) places a right-of-way easement in public use where otherwise the public would have no right to traverse the property. Such a transfer has occurred.

First, the railroad right-of-way at issue properly belongs in the control of the property owners. When created, this right-of-way was limited by its terms to not allow for use as a public recreational trail. Once the right-of-way was no longer in use for the passage of trains, the right-of-way extinguished and unencumbered title reverted to petitioners. Accordingly, although ICC had not yet relinquished regulatory jurisdiction, the right to pass over the property rested solely with the petitioners.

Section 1247(d) authorizes public trail use thereby preempting petitioners' reversionary right to regain control of the right-of-way. This preemption cuts off and defeats property rights that have otherwise vested under

state law. By cutting off petitioners' property rights, Section 1247(d) effects a taking of those rights.

The takings conclusion is buttressed by the determination of every other court that has addressed the issue. Moreover, since creation of an interim trail requires abandonment of rail uses sufficient to justify full relinquishment of ICC jurisdiction, petitioners' reversionary interest should be viewed as vested. Only Section 1247(d) precludes the otherwise vested reversion from becoming presently possessory. Even if not considered vested, the preemption of a reversionary interest that will be imminently vested supports the takings conclusion.

The takings issue is properly before the Court. The exclusive jurisdiction to review an order of ICC is in the Court of Appeals. Petitioners followed this directive in seeking judicial review of the ICC order at issue in this case. Review of that order necessarily involves the takings issue because the ICC's order to not issue a full abandonment certificate is in part based on its interpretation that Section 1247(d) does not terminate the petitioners' reversionary interest. Accordingly, the takings issue was properly before the Circuit Court and is appropriate for consideration by this Court.

ARGUMENT

I

SECTION 1247(d) EFFECTS A TAKING OF PETITIONERS' REVERSIONARY PROPERTY INTEREST

If Section 1247(d) conveys a right-of-way easement to the public which otherwise belongs to petitioners, there is

a taking for which compensation must be paid. There is no doubt that the exercise of governmental authority which transfers to the public an easement or right "to pass to and fro" across otherwise private property constitutes a taking. *Nollan v. California Coastal Commission*, 483 U.S. ___, 97 L. Ed. 2d 677, 685-86 (1987). This Court has repeatedly reaffirmed that the right to exclude others is one of the "most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Nollan*, 97 L. Ed. 2d at 686. As explained in *Nollan*:

"To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning. . . . We think a 'permanent physical occupation' has occurred." *Nollan*, 97 L. Ed. 2d at 685-86.

The petitioners have suffered no less of a taking merely because ICC is preventing them from reacquiring the property rather than appropriating the property directly. There is no practical difference between government actions that require a person to convey an easement to the public and government actions that prevent limited easements from being extinguished by cutting off the landowner's right to unencumbered fee title. In either case, land that is otherwise not open to public access is required to be opened for such use by government action.

A. Under State Law, the Right-of-Way Belongs to Petitioners

The starting point in the takings analysis is to identify what party held the right to use the right-of-way. The

petitioners claim, and the Circuit Court below assumed as true, that the petitioners held that right. The basis for petitioners' claim is that the right-of-way was originally created for limited purposes which did not include use of the right-of-way for a public recreational trail. *Preseault*, 853 F.2d at 150. Under Vermont law, when use of the right-of-way for the limited purposes intended in the original conveyance was abandoned, the easement extinguished and unencumbered title reverted to the petitioners. *Id.*; Pet. at 10 n.2.

B. Section 1247(d) Preempts Petitioners' Reversionary Right to the Right-of-Way, Thereby Resulting in a Taking

Section 1247(d) authorizes creation of a public trail along the right-of-way even though the circumstances triggering the extinguishment of the right-of-way have occurred. Despite the common sense conclusion that such preemption of property rights is a taking of those rights, the Second Circuit nevertheless concluded that there was no taking or postponement of the reversionary interest because ICC did not issue a certificate of abandonment. Since there was not a formal abandonment, ICC retained jurisdiction over the right-of-way and the reversionary interest could not vest. *Preseault*, 853 F.2d at 151. The Second Circuit, however, misses the point. In answering the identical argument, the District of Columbia Circuit in *National Wildlife* accurately recognized that this logic evades but does not answer the takings question.

"This response may accurately describe the effect of . . . [Section 1247(d)], but it does not resolve the question posed by petitioner Beres, namely, whether the postponement of a reversionary interest that would otherwise vest under state law constitutes a taking." *National Wildlife*, 850 F.2d at 704.

The error in the Second Circuit's rationale stems from its use of the term "abandonment." While it is clear that the right-of-way may not be fully "abandoned" for ICC purposes, and therefore ICC may continue to exercise jurisdiction over the right-of-way, this must not be confused with whether a change in use or abandonment has occurred under the terms of the original conveyance as interpreted by state law. If the reversion would have been triggered under state law, as the court assumes is the case, ICC's continued exercise of jurisdiction over the right-of-way preempts the operation of state law and thereby interferes with and defeats state recognized property rights which otherwise vest and become presently possessory. The result is a taking. This is the conclusion of every other court that has addressed the issue. See *National Wildlife*, 850 F.2d at 702-08, 706 (cases considering limited easements "have uniformly found that a change in use from rails to trails constitutes abandonment of the right-of-way"); *Lawson v. State of Washington*, 107 Wash. 2d 444, 730 P.2d 1308 (1986); *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 428 N.E.2d 671, 673 (1981).

But for Section 1247(d) petitioners' reversionary interest not only vests, it becomes presently possessory. A review of the procedure for creating an interim trail bears this out.

A prerequisite to establishment of an interim trail use is an application by the railroad to abandon or discontinue the line.² The railroad is not required to enter into an interim trails agreement but may do so if a qualified organization comes forward to assume responsibility.³ If the railroad intends to enter into an interim trail use agreement, ICC will not issue the regular certificate of abandonment but instead will issue either a Certificate of Interim Trail Use or Abandonment (CITU) (for formal abandonment proceedings), or a Notice of Interim Trail Use or Abandonment (NITU) (for exempt abandonment proceedings). In either case, if an agreement is subsequently not reached, the railroad is nevertheless permitted to fully abandon the line. 49 C.F.R. §§ 1152.29(c)(1) and (d)(1).

² The procedures for seeking a certificate of abandonment are provided in 49 U.S.C. §§ 10903-10905. Certain railroads that have not carried local traffic on the route for more than two years may be exempt from the formal abandonment procedures and may apply for abandonment through the Notice of Exemption procedure provided in 49 C.F.R. § 1152.50; Pet. App. at 58-59. This is the procedure utilized by Vermont Railway in the present case. Regardless of which procedure is used for seeking abandonment of the line, 49 C.F.R. § 1152.29 provides the procedure for creating an interim trail use.

³ Neither ICC nor the railroad initiates the establishment of an interim trail use. Rather, "any state, political subdivision or qualified private organization" that is "interested in acquiring or using a right-of-way" proposed to be abandoned may inform ICC of its desire to establish a public trail pursuant to Section 1247(d). 49 C.F.R. § 1152.29(a). The railroad must then reply to ICC indicating whether it intends to negotiate an agreement for interim trail use. 49 C.F.R. § 1152.29(b)(5).

Significantly, these procedures demonstrate that interim trail use can be created only if full abandonment is warranted. As pointed out in *National Wildlife*: "If the railroad declines to consider trail use, it will be issued a full abandonment certificate. If the railroad agrees to negotiate a trail use agreement, it will be issued a 'Certificate of Interim Trail Use or Abandonment' (CITU) . . . If negotiation fails, the CITU automatically converts to a full certificate of abandonment." *National Wildlife*, 850 F.2d at 699 n.5. This is consistent with ICC's own interpretation: "If the railroad refuses to negotiate a Trails Act agreement, it obtains a full abandonment certificate and, following consummation, the line is no longer subject to our jurisdiction for any purpose." *Rail Abandonments - Use of Rights-Of-Way As Trails*, Ex Parte No. 274 (Sub-No. 13) (I.C.C. Slip Op. at 5 n.5) decided February 10, 1989.

Under this procedure, petitioners' reversionary interest necessarily becomes possessory absent the effect of Section 1247(d). As recognized by the Washington Supreme Court:

"Put simply, abandonment by the railroad is a necessary predicate to use as a recreation trail. At the time of abandonment plaintiffs' interest becomes possessory." *Lawson*, 700 P.2d at 1316.

In answering the takings question the reversionary interest is properly viewed as having vested pursuant to state law but the interest has been preempted from becoming effective by operation of Section 1247(d). This interpretation is consistent not only with the procedure for implementing Section 1247(d), but also with the rules for compensation for future interests.

"[I]f, at time of taking, the event upon which property is to revert is imminent, and its occurrence within a reasonably short time probable, the future interest holder is entitled to compensation." *Lawson*, 730 P.2d at 1315-16 (citing 2 J. Sackman, *Nichols on Eminent Domain*, § 5.05[1] (3d rev. ed. 1985)).

Similarly, the District of Columbia Circuit in *National Wildlife* found that the imminence of vesting of the reversionary interest was sufficient to show that the interest is taken by the operation of Section 1247(d).

" '[T]he Commission suggests that . . . the holder of a reversionary interest has nothing more than a *future interest* which might never mature and which is simply *postponed* in the event of a trail use arrangement.' . . . [W]e notice that the Commission cites no authority for the proposition that government action that precludes the vesting of a reversionary interest does not constitute a taking of property. The purported proposition of law is manifestly contrary to the underlying economics - analogous to saying that a lessor's interest in his property has not been 'taken' when the term of a fully paid leasehold is extended indefinitely. It is therefore not surprising that a number of sources suggest it is unsound, particularly when the event that will trigger the reversion of the interest is imminent at the time of the appropriation." *National Wildlife*, 850 F.2d at 704 (emphasis in original; citations omitted).

The error in the decision below is succinctly stated by the *Lawson* court and reaffirmed by *National Wildlife*.

"The argument that the statutes are valid because they do not 'eliminate' plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the

statutes, they would not." *Id.* at 705 n.16 (quoting *Lawson*, 730 P.2d at 1313).

C. The Purposes of Section 1247(d) Reinforce the Takings Conclusion

The takings conclusion is strongly reinforced by analysis of the purpose for enacting Section 1247(d). One of the stated objectives for allowing conversion of rails to trails was to preserve the right-of-way for potential future rail use. 16 U.S.C. § 1247(d). However, there is little doubt that the only reason the section specifies that interim trail use shall not constitute "abandonment," even though rail service is discontinued, is to prevent reversionary interests that would otherwise vest from taking effect. The House Report accompanying the 1983 amendments to the Trails Act which codified Section 1247(d) states:

"The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." H.R. Rep. No. 98-28, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S. Code Cong. & Admin. News 112, 119-20.

The Ninth Circuit has recognized that this House Report "indicates that § 1247(d) was enacted primarily to prevent rights-of-way from reverting to their owners

upon cessation of railroad use." *Washington State Department of Game v. Interstate Commerce Commission*, 829 F.2d 877, 881 (9th Cir. 1987). Even ICC admitted in its decision upholding approval of the trail agreement in this case that "[i]nvariably, interim trail use will conflict with the reversionary rights of adjacent landowners, but that is the very purpose of the Trails Act." Pet. App. at 53. Moreover, ICC has expressly recognized that the intent of Congress was to preempt state property law.

"This language, and its legislative history, express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operations." *Rail Abandonment - Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 600 (1986).

The effect of achieving the congressional purpose of defeating the reversionary interests of property owners is to take those rights without payment of just compensation in violation of the Fifth Amendment. Although Congress has decided that preventing the vesting of reversionary interests is an important public purpose, and has therefore effectively preempted those rights, this does not preclude application of the Takings Clause. As recognized in *Ruckelshaus*:

"EPA encourages us to view the situation not as a taking of Monsanto's property interest in the trade secrets, but as a 'pre-emption' of whatever property rights Monsanto may have had in those trade secrets. . . . This argument proves too much. If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Takings Clause has lost all vitality." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1012.

Section 1247(d) preempts state law by cutting off for an indefinite period of time otherwise vested property rights. Under the applicable case law, this constitutes a taking by transferring to the public a right-of-way easement that otherwise belongs to petitioners. The fact that at some point in time the trail use may also cease and ICC will decide to relinquish jurisdiction does not change the takings analysis. Rather, such an occurrence would merely convert the taking into a temporary one and compensation would only need to be paid for the time that the taking was effective. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

II

THE TAKINGS ISSUE IS PROPERLY BEFORE THE COURT

The government has suggested that the takings issue raised by operation of Section 1247(d) is not properly before the Court. Brief for Federal Respondents in Opposition to Petition for Certiorari at 5-6. The government contends that any takings claim must be raised in a suit for compensation filed with the Claims Court.

The nature of the present action is a challenge to an order of the Interstate Commerce Commission. Pet. App. at 47-54 (ICC order for Docket No. AB-265 (Sub-No. 1X) and Finance Docket No. 30702); Pet. App. at 55 (notice of action challenging ICC order). That order dismissed petitioners' request that a full abandonment certificate be issued. The order also concurrently upheld the establishment of an interim trail use pursuant to Section 1247(d).

Pet. App. at 44. ICC reasoned that dismissal of petitioners' request for full abandonment was "appropriate" since, in ICC's judgment, the reversionary rights of petitioners had not been "terminated" or "extinguished." Pet. App. at 53. The order therefore relied in part upon its interpretation that Section 1247(d) did not extinguish or take petitioners' reversionary title claims to the right-of-way. Whether that is a correct interpretation of the statute raises the question of whether Section 1247(d) effects a taking. Review of ICC's order, and its basis for decision, necessarily requires a determination of whether Section 1247(d) effects a taking of petitioners' reversionary property rights.

Because of the posture of the takings issue presented here, there is not, nor need there be, a claim for compensation at this time. As mentioned, the takings issue is raised in the context of review of an ICC order. The petitioners sought review directly in the Court of Appeals as they were required to do by specific direction of Congress. Under 28 U.S.C. § 2342 the Court of Appeals "has *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all rules, regulations, or final orders of the Interstate Commerce Commission." (Emphasis added.) See also *Preseault*, 853 F.2d at 148.

That the takings issue is properly before the Court is confirmed by the disposition in *Federal Communications Commission v. Florida Power Corporation*, 480 U.S. 245 (1987). The appellees in *Florida Power* challenged the Federal Communications Commission's (FCC) regulatory actions taken pursuant to the Pole Attachments Act. The FCC by order rejected the appellees' argument that the

commission's calculations of pole attachment rental rates resulted in a taking. Appellees sought review of the FCC order in the Court of Appeals for the Eleventh Circuit. The Circuit Court held that the Pole Attachments Act was unconstitutional as effecting a taking of property without just compensation. No claim for compensation was made by appellees in the Claims Court. Rather, as in the present case, they sought review of the FCC order in the Circuit Court. The Supreme Court addressed the takings issue with no mention of infirmity due to absence of a claim for compensation in the Claims Court.

Petitioners here are seeking judicial review of an ICC decision. Since the ICC order is based in part on a determination that Section 1247(d) does not extinguish petitioners' reversionary rights, that issue was properly before the Court of Appeal and is appropriate for consideration by this Court.

CONCLUSION

The opinion below holds that a federal statute which indefinitely denies a property interest as recognized under state law does not effect a compensable taking. That ruling is incorrect. Although Congress may choose to preempt state law with regard to the exercise of property rights, such preemption results in a taking where otherwise vested property rights are cut off and

prevented from taking effect. Accordingly, amici respectfully urge the Court to reverse the decision of the court below.

DATED: June, 1989.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON, and VERMONT RAILWAY, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

**BRIEF OF MISSOURI FARM BUREAU FEDERATION
AND CITIZENS TO PRESERVE PROPERTY RIGHTS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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AND CITIZENS TO PRESERVE PROPERTY RIGHTS AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

The Missouri Farm Bureau Federation and Citizens to Preserve Property Rights respectfully file this brief *amici curiae*. Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of all the parties.

INTEREST OF AMICI CURIAE

The Missouri Farm Bureau Federation of 701 S. Country Club Drive, Jefferson City, Missouri is a voluntary, not-for-profit general farm organization comprised of 111 affiliated county Farm Bureaus with a membership of over 77,000 member families. Its purpose is to represent, serve and protect the rights and interests of farmers and ranchers in Missouri, including the protection of private property rights. Pursuant to that purpose, Missouri Farm Bureau Federation has a stated policy objective to

protect the private property rights of landowners in abandoned railroad right-of-way easements.

Citizens to Preserve Property Rights is an ad hoc group of approximately 120 landowners along the abandoned M-K-T Railroad right-of-way in central Missouri. This group was expressly formed to protect their private reversionary interests in the abandoned M-K-T right-of-way by preventing the application of section 1247 (d) from denying them full use and enjoyment of that property. Members of this group are plaintiffs in the case of *Glosemeyer, et al v. M-K-T Railroad, et al.* which is currently on appeal to the 8th Circuit Court of Appeals. Members of this group are successors in interest to the original grantors of the M-K-T Railroad easement, and have expended considerable time and money in protecting property that is rightfully theirs. As such, they share a special kinship with the Preseaults.

STATEMENT OF THE CASE

The facts of this case are presented by Petitioners. The legal issues to be resolved are in a "clean posture" such that they can be fully and completely resolved by this Court.

INTRODUCTION

As described by Petitioners and their supporting *amici curiae*, section 1247(d) known as "Rails-to-Trails" was enacted to prevent the reversion of abandoned railroad rights-of-way to their rightful owners so that the way could be preserved for recreational trail use. The statute was expressly enacted to overturn settled state law that provides for the extinguishment of a railroad interest when the right-of-way is no longer used for railroad purposes. As with the Preseaults, the Missouri easements expressly limited the railroad interest to use of the way for "railroad purposes, and no other purpose." When that condition is no longer met, the landowners find that they cannot reclaim their property. Rather, they must

abide recreational trail use across their property under section 1247(d) even though they have not consented to this use. Similarly, the Preseaults were given no opportunity to consent or dissent to the proposed trail use across their property. The statute does not require it.

There is no question that the sole purpose of section 1247(d) is to develop recreational trails. There is also no question that by denying landowners their rights to property that are defined by the granting easement—rights that are expressly recognized and protected by state law—section 1247(d) also effects a "taking" of that property in violation of the Fifth Amendment. As with the Preseaults, *amici curiae* were not offered any compensation for the rights which were taken, nor does the statute provide or allow for it. All dealings with the MKT right-of-way were between MKT and the trail user as provided by section 1247(d). These points are briefed below and in the briefs of Petitioners and other supporting *amici curiae*.

Negating the landowners' reversionary easement rights are bad enough. But "Rails-to-Trails" has a number of impacts on landowners beyond that. Suffering the presence of an unauthorized third party on the property creates a number of situations that make matters worse. These problems are magnified by the recent decision of ICC, the agency charged with overseeing the "program", abdicating that oversight function. *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*. Ex Parte No. 274 (Sub. No. 13), decided May 18, 1989.

For example, these interests are subject to real estate taxes. As fee owners, the landowners could lose the property if taxes are not paid by the trail user who has agreed to pay them. The ICC refuses to assume responsibility to protect the landowner to see that taxes are paid.

Also, the ICC in that same decision has refused to ensure that trails are properly maintained and to intercede to ensure that their structure does not interfere with the use of the abutting property. Likewise, there is no mechanism to ensure that liability insurance has actually been obtained by the trail user. ICC has even refused to initiate a procedure whereby the landowner can obtain the name and address of the responsible trail user to discuss these matters.

Another problem is the issue of subsurface easement rights. Utility companies, especially telephone companies, like to use old rights-of-way to run wires and cables. The use of rights-of-way to bury fiber optic wires is especially important. It is also quite lucrative. Yet, even though trail groups do not have rights to, and have no use for the subsurface, they are taking the money for such utility easements. Again, ICC has refused to intervene or clarify the situation.

In section 1247(d) and implementing regulations, Congress and the ICC established an elaborate framework to allow third party interlopers to come onto private property and use it for uses which neither the original easement grantor and grantee intended or expected. At the same time, both Congress and the ICC washed their hands of any responsibility for overseeing the inevitable conflicts that are bound to occur. This behavior is especially odd in light of the purported "railbank" policy of the Act. Such behavior can only mean that "railbanking" is a sham and not the purpose of section 1247(d).

The purpose of this brief is to expose section 1247(d) for the sham that it is.

ARGUMENT

I. SECTION 1247(d) CANNOT BE SUSTAINED ON A "RAILBANKING" RATIONALIZATION

If the real purpose of the Rails-to-Trails Act [16 U.S.C. § 1247(d)] is not a railroad purpose, it cannot be sustained on the basis of the Commerce Clause within the context of the means provided by the statute. The ICC has no independent, continuing jurisdiction or interest in the preservation and maintenance of recreational trails. If railbanking is not the real purpose of the act, then the "key finding" of section 1247(d) that "interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes," is completely unsupported and not only has no rational basis but no basis in fact. (We submit that this "finding," by its very terms, with or without "railbanking" is completely baseless and illogical anyway.) Even the court below acknowledged that there must be a "railroad purpose" in order for the ICC jurisdiction to attach.

The court below erred both in its cursory examination and conclusion that this is a railbank statute, and also in its analysis of the standard of review applicable to determine statutory purpose.

In *Nollan v. California Coastal Commission*, 483 U.S. —, 107 S.Ct. 3141, 97 L. Ed.2d 677, 692 (1987) the Court reiterated the judicial standard applicable in cases involving Fifth Amendment "taking" claims:

"We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and imagination*. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advancement' of a legitimate State interest. We are

inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement rather than the state police power objective." (Emphasis added)

Thus, rather than blindly accepting the stated purpose of the statute, as the court below did, *Nollan* requires the Court to look behind the law to determine its *real* purpose.

Applying *Nollan*, it is clear that the real purpose of section 1247(d) is to subvert the private property rights of individuals in order to develop recreational trails. Railbanking was an afterthought that was an "exercise in cleverness and imagination" solely to attempt to justify ICC participation.

Railbanking itself is a chimerical concept. Any railroad that has borne the time and expense to pursue abandonment or discontinuance proceedings, take up tracks, discontinue tariffs and re-route traffic over other rail lines is not likely to incur additional heavy expenses to re-lay tracks, repair roadbeds, bridges and other facilities, and re-start services on an abandoned line. These expenses are far more substantial than attempting to obtain a right-of-way. Any shippers who might have used the line have already been forced to find alternate transportation. Any new business that might locate in the area has already considered the lack of rail facilities and would have already arranged other ways to satisfy their transportation needs.

This case illustrates the point. Service had been discontinued and tracks had been taken up more than 10 years prior to these proceedings. Another 10 years would likely have passed with no change had Petitioners not initiated their quiet title action. There is no indication that anyone, including the railroad and people along the abandoned right-of-way, expect or even want resumption

of rail service. For all intents and purposes, the line is forever gone.

It is true, as the court below points out, that Congress in 1976 requested a study on the feasibility of the railbank concept as a possible means of preserving abandoned rail corridors. What the court does not say is that the concept was *rejected*. Conducting the study required by Congress, the Secretary of Transportation concluded that a "Federal railbanking program not be established at the present time." (*Availability and Use of Abandoned Railroad Rights-of-Way*, Dep't of Transportation, 1977). This conclusion was based primarily on a finding that there was no demand for railbanking, precisely for the reasons stated in the preceding paragraph. The limited railbank program added by the Railroad Revitalization and Regulatory Reform Act of 1976—the statute which requested the railbank study) was subsequently repealed in 1980.

Thus, as of 1983, there was no federal policy in support of railbanking. In fact, federal policy was *opposed* to the concept. No new factors were brought forward that might indicate that a change in policy was warranted, and no justification was given to support the concept.

A. "Railbanking" In Section 1247(d) is Inconsistent With ICC Abandonment Authority and Jurisdiction

One factor indicating that "railbanking" was nothing more than a pretext for the blatantly unconstitutional seizing of private property to develop recreational trails is section 1247(d)'s inherent inconsistency and conflict with statutorily mandated ICC abandonment authority and jurisdiction.

"Railbanking" under section 1247(d) is purportedly the preservation of railroad rights-of-way for some nebulous and uncertain possibility that they might perchance again be used for a railroad use sometime in the undefined future.

Yet 49 U.S.C. § 10903 requires the ICC to permit abandonment "only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." (Emphasis added). "Future" public convenience and necessity necessarily includes a determination whether or not the rail line would be needed for future rail needs—the very same thing as railbanking.

The paradox and conflict between the two statutes comes from the fact that section 1247(d) can only be invoked *after* the ICC has determined that present or future public convenience and necessity requires or permits abandonment. As the ICC states it:

"In every Trails Act case, we will *already have found* that public convenience and necessity permit abandonment (or that regulatory approval is not required under 49 U.S.C. 10505)." ¹

Thus the conflict—a right-of-way will be allowed interim trail use for "railbanking" purposes, *only after the ICC has determined that railbanking is not appropriate!* Without that finding, a right-of-way subject to interim trail use cannot be "railbanked." ²

Moreover, as will be more fully discussed below, the Rails-to-Trails statute provides that interim trail use be determined by those seeking trail use and not by either the railroad, affected shippers or the ICC. If this is a railbank statute, as its proponents claim, this fact adds additional irony to the paradox discussed above. For this would allow "railbanking" to be determined by

¹ *Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures*, 54 Fed. Reg. 8011, 8012, fn. 3, 1989). (Emphasis added)

² The same circumstances would be present in exemption cases, despite the lack of formal ICC proceedings and findings. The argument in these cases for abandonment is even more compelling, since exempt lines have not been used for at least 2 years and no one cares that the line be abandoned.

non-railroad people who have no interest in the continuation of rail service, after the ICC and the railroad itself have determined that there is no future utility in preserving the line.

Thus, the carefully considered decision of the experts and those most affected by the operation of the rail line would be allowed to be overridden by people who do not have any interest in continued rail service, and who expressly do not want resumption of rail service. For that would conflict with their trail use. To sustain the Rails-to-Trails statute as a railbank purpose and thus to permit this result would make a mockery of the abandonment and discontinuance sections of the Transportation Code.

The ICC itself recognized the conflict between section 1247(d) and its long-standing traditional responsibilities under the Transportation Code. In its preliminary decision on section 1247(d), the Commission stated:

However, the amendment appears to conflict with the Commission's statutory responsibilities under 49 U.S.C. 10904. Under 49 U.S.C. 10904, if the Commission finds that the public convenience and necessity require or permit abandonment of a rail line or discontinuance of rail service, it must, within a specific time, issue a certificate permitting abandonment or discontinuance. Under 16 U.S.C. 1247(d), if a party seeks to use the underlying right-of-way for a trail and is willing to comply with certain requirements, the Commission may not permit an abandonment or discontinuance "inconsistent" with trail use.³

The ICC again was concerned with "the apparent conflict between our responsibilities under section 10904" and section 1247(d) in its subsequent rulemaking decision on rails-to-trails. See — *Rail Abandonments*—

³ *Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub. No. 13), decided February 11, 1985, at p. 2.

Use of Rights-of-Way as Trails, Ex Parte No. 274 (Sub. No. 13), decided April 16, 1986, at p. 16. There is no indication that the ICC ever resolved the conflict it realized between the two statutes.

**B. Legislative History and Outside Circumstances
Show That There is No "Railbanking" Purpose**

"This purpose, if one goes along with the ICC, is expressly to preserve ROW's for 'future rail operations'—a complete myth if ever there was one, and both sides know it."⁴

This statement, by the very trails proponents who would have the Court now find a "railbank" purpose, accurately summarizes the feelings of Congress, the ICC, and all parties dealing with section 1247(d). In the context of *Nollan*, it is both appropriate and necessary for the Court to look beyond the stated purpose of the act to determine its true purpose in cases where Fifth Amendment "takings" claims are raised.

Both Congress and the ICC expressly admit that trail development, not railbanking, was the purpose of Rails-to-Trails.

There are several factors that compel this conclusion. First, the statute itself states that its purpose is to "encourage State and local agencies and private interests to establish appropriate trails using the provisions of programs such as rail programs." It requires the ICC to "not permit abandonment or discontinuance inconsistent or disruptive of such [interim trail] use." This provision was added to the National Trails System Act, whose purpose is "to provide for the ever-increasing outdoor recreation needs of a nation," and not to the Transportation Code, which would govern "railbanking" and with whose provisions section 1247(d) is inherently inconsistent.

⁴ Newsletter of BSTRA, Inc. and the Southern New England Trails Conference, Sept. 1986, p. 2.

Secondly, the bill was only considered by the Senate Energy and Natural Resources Committee and the House Interior and Insular Affairs Committee,⁵ and not by any of the committees with substantive jurisdiction over transportation matters. This is particularly significant in view of a statement in the bill that it is "in furtherance of a national policy to preserve established railroad rights-of-way for future reactivation." As shown above, there *was no national policy* of railbanking, and such a policy had been specifically *rejected* both by the Transportation Department and also by Congress (when it repealed in 1980 the limited railbank of the 4-R Act.).

The House Report accompanying the National Trails System Act amendments of which rails-to-trails was a part, states: "Section 208 amends Section 8 of the Act to encourage the development of recreational trails."⁶ (Emphasis added)

Of particular significance and enlightenment about the purpose of section 1247(d) is the following committee statement:

"The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program."⁷

Since the act amends the National Trails System Act, the "program" referred to is the national trails program. The "problems" are state laws (like Vermont) and cases which extinguish easements granted for railroad purposes

⁵ See 1983 U.S. Code Cong. and Admin. News, p. 112.

⁶ H.R. Rep. No. 98-28, 92 Cong., 1st Sess. p. 8, reprinted 1983 U.S. Code Cong. and Ad. News 119.

⁷ *Id.*

upon cessation of railroad use, thereby making them unavailable for trail conversion.

In *Pollnow v. State Department of Natural Resources*, 276 N.W. 2d 738 (Wisc. 1979) the Wisconsin Supreme Court upheld the "general rule" that "when a railroad takes an easement for railroad purposes, and subsequently abandons it, the land goes back to the original owner or his grantees." To permit a conversion of a public transportation system to a recreational system would "stretch the principle . . . beyond reasonable limits."

The principle was reiterated in *McKinley v. Waterloo Railroad Company*, 368 N.W. 2d 131 (Iowa 1985). The Iowa Supreme Court was "unable to find anything in section 10906 of the 4-R Act which purports to transform that interest of the railroad into a greater interest or to permit the railroad, by alienation, to elevate that interest to an easement free of the Iowa abandonment statute."

A similar result was reached in *Schnabel v. County of DuPage*, 428 N.E. 2d 671 (Ill. App. 2d Dist. 1981). The court there held that the "easement expires by its own limitation when the land is no longer used for a railroad right-of-way."

In none of these cases was "railbanking" a consideration. Rather, each case was concerned solely with the issue of conversion to trail use. It was the trail conversion "problem" that Congress and the ICC addressed in 1247(d).⁹

⁹ The ICC states: "This language, and its legislative history, express congressional intent to preempt State property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operations, as occurred in *Pollnow* and *Schnabel*, *supra*." (*Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub. No. 13), decided April 16, 1986, p. 9)

These courts, and all subsequent state courts that have decided the issue,⁹ have all given effect to the language or scope of the specific easement at issue. In no case did the court seek to extend the easement beyond the four corners of the document. Yet, Congress, in order to encourage more trails, attempted to make such an extension. It attempted to somehow allow the railroad to maintain an interest in the right-of-way that would otherwise be extinguished when it ceased using the line for "railroad purposes", as set forth in the easement grant. Hence, the act's insupportable and inherently illogical finding that recreational trail use is not an "abandonment for railroad purposes."

The committee apparently believed that such a cavalier statement, wiping out private property rights granted by easement, would solve the "problem" of reversionary interests, stating:

"The concept of attempting to establish trails only after the formal abandonment of railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there is nothing left for trail use. This amendment would ensure that interim trail use is considered prior to abandonment."¹⁰

The ICC admits the true purpose of section 1247(d) even more bluntly:

The legislative history states that the "key finding" of section 1247(d) "is that interim use of a railroad

⁹ See *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986); *Washington Wildlife Preservation, Inc. v. State of Minnesota*, 329 N.W. 2d 543 (Minn. 1983) and *Rieger v. Penn Central*, No. 85-CA-11 (Ct. of Appeals of Green County, Ohio, dated May 21, 1985).

Even though *Washington Wildlife* and *Rieger* permitted trail use, it was only after a thorough analysis of the scope of the easement at issue and only after finding that the scope of the easement permitted trail conversion.

¹⁰ H.R. Rep't No. 98-28, 98th Cong., 1st Sess., p. 8.

right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." *This language demonstrates that the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreational use when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interest.*¹¹ (Emphasis added)

There can be no doubt that the purpose of section 1247(d) was not to promote some lofty, ephemeral "railbank" goal, but was merely "an exercise in cleverness and imagination" to steal private property for recreational trail use. Both Congress and the ICC, the implementing agency, freely admit it.

C. The Rails-To-Trails Scheme Itself Refutes the "Railbank" Rationalization

The scheme itself refutes the idea of a "railbank" purpose. By contrast, all signs point to the fact that the scheme was strictly to develop recreational trails.

a. There is no requirement that the ICC find a line proposed for abandonment to even be suitable or necessary for "railbanking."¹² In fact, the ICC has expressly indicated that it will *not* determine whether "railbanking" is feasible. See *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*.

¹¹ *Rail Abandonments—Use of Right-of-Way as Trails*, Ex Parte 274 (Sub. No. 13), — ICC 2d —, decision served 6 May 1986, slip opinion, p. 7.

¹² In fact the opposite is true. ICC must find a line is not suitable for railbanking in order to trigger section 1247(d). (See pp. 7-10, *supra*).

ICC 2d —, decided December 2, 1987. Rather, it will *only* determine whether the Trails Act is applicable to a given situation. The agency acknowledges that "[w]e lack any discretion to decide whether railbanking and use of the right-of-way as a trail is desirable . . ." Accordingly, its sole role is that "we need only be assured that the Trails Act has been properly invoked and that its requirements will be met." Nor was there any "railbank" finding in this case. The ICC permitted the railroad to abandon the line by filing a Notice of Exemption. The line in question had not been used since 1975, and the railroad had already removed its track and equipment. There is no question that the railroad fully intended to forever relinquish its interest in the line.

b. Only parties interested in developing trails have authority to initiate "railbanking" under section 1247(d). (49 CFR 1152.29). Not only does the ICC or the railroad not have authority under the statute to invoke "railbanking," but those decisions are left to parties that have no interest in the future rail use of the line. Also, such decisions are made by trails advocates based solely on the suitability of the right-of-way for trail development. Suitability or desirability for "railbanking" have no place for consideration in the 1247(d) process.

c. Once trail interest is expressed, the decision to transfer for trail use is completely voluntary with the railroad. See *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988); *Washington State Department of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987) and *Connecticut Trust for Historic Preservation v. ICC*, 841 F.2d 479 (2d Cir. 1988).

This decision by the railroad does not require any commitment by the railroad to even consider a return to service anytime in the future. The statute merely allows them another way out of a right-of-way which they have already sought to abandon forever and which they

have no use for. The statute does, however, permit the railroad to receive compensation from trail groups for an easement in which they no longer have an interest under state law. That right-of-way, we submit, should be negotiated with the landowners who actually own the property.

Decisions by the railroad to enter trail use agreements should not be viewed as evidence that they intend or even contemplate a return of service. Rather, the decision is skewed by the fact that the statute allows the railroad to get something for nothing.

d. Trail developers also have absolute authority to terminate a "railbank" if a railroad has not sought re-use prior to the time that the trail group grows tired of it [49 CFR 1152.29(c)(2)].

These factors cast serious doubt over the purported "railbank" purpose of section 1247(d), any "national policy to preserve established railroad rights-of-way for future reactivation of rail service" notwithstanding. Not only is there no such "national policy," either before or after section 1247(d), but the ICC, the railroads and shippers who would be interested in future rail use cannot even invoke the purported "railbank" of section 1247(d). Moreover, not only do trail groups have sole authority to initiate "railbanking," they also have sole authority to terminate it if no railroad has intervened during the period of trail use. Thus, people who have no interest in rail use not only have sole authority to make deposits to a "railbank," they also have sole authority to make withdrawals.

The ICC provides even further measure of the falsity of the purported "railbank" purposes of section 1247(d). The ICC is the agency responsible for implementing this scheme. Yet, in its implementing decision, *it actually provides advice on how to defeat railbanking and avoid future rail restoration*. The agency advises that "under

certain circumstances . . . trail developers may find it advantageous not to invoke section 1247(d) and thereby avoid the property being subject statutorily to future restoration of rail service."¹³ This is hardly appropriate conduct for an agency that is entrusted with implementing a national "railbank" policy. Rather, it further illustrates that "railbanking" is only a sham and a pretext for the real purpose of trail development.

Applying the *Nollan* criteria, looking into the real purpose of a statute that affects private property rights, it is clear that the purpose of section 1247(d) is trail development and not "railbanking."

We are aware that the D.C. Circuit declined to hold that railbanking was necessarily a fiction. *NWF v. ICC*, *supra* at 707. However, the *Chicago Northwestern Transportation Co.* case which it cites is vastly different than the situation presented under 1247(d). In that case, the railroad itself requested an amendment of its abandonment petition, upon the request of a shipper, to postpone complete abandonment. The shipper was contemplating a new facility that would require substantial traffic over the line. If the new facility came to fruition, the line would be transferred to the shipper. These factors were advanced and considered by the ICC prior to its decision.

Thus, in that case the "railbank" initiative was brought by the railroad and shipper, and not by a disinterested trail developer. Further, there was a definite need and a real possibility of service resumption, not a nebulous, uncertain possibility that service could be resumed such as is the case with section 1247(d). It is still noteworthy that in this case, where there was a real possibility of future use, the C & NW did not want to be a part of it. Rather, it specified that the utility be

¹³ Decision of April 16, 1986, *supra*, at p. 8.

able to purchase the line if future use became feasible. In any event, C & NW wanted out of the arrangement, just like virtually all railroads seeking to abandon lines want. If they didn't would they even seek abandonment in the first place?

D. There Is No "Nexus" Between Railbanking and Section 1247(d)

Not only does *Nollan* require looking beyond the stated purpose of a statute in Fifth Amendment "taking" cases, but it also requires that there be a clear "nexus" between the desired end and the means employed.

The conditions for achieving a "railbank" are so attenuated as to form no reasonable nexus between the taking of the landowner's easement and the railbank itself. Accomplishment of this federal scheme depends on the independent decisions of several parties, none of whom are the federal government. In fact, the federal government does not have any control or even a say in what those decisions will be.

Again, section 1247(d) as a "railbank" statute flunks the *Nollan* test. In order to achieve a "railbank" the following factors must all fall neatly into place:

1. A trail group must decide to want the right-of-way for trail purposes. As noted, this entails no "railbank" consideration.
2. The abandoning railroad must decide to negotiate a transfer for interim trail use. Again, this requires no commitment or even an expression of possibility that it will ever use the line again. Removal of tracks, discontinuance of tariffs, re-routing of service and actual physical conversion of the right-of-way to a recreational trail militate *against* future rail use.
3. A trail use agreement must be reached between the railroad and trail developer within 180 days.

4. The trail must actually be developed. This entails even more alteration to the right-of-way inconsistent with railroad use. This factor would make it even more expensive for a railroad to re-start the line, causing them to think twice before doing so.
5. The railroad must actually resume service before trail use ends. As noted previously, the substantial expenses involved in re-starting the line, coupled with the alternative transportation routes and the weaning of shippers toward use of the alternative routes, make such resumption a highly speculative proposition.
6. Conversely, the trail group must not decide to tire of the trail before such resumption of rail service. If it does, the line will be considered abandoned as it should have been when trail use was granted.

Under such an attenuated scheme, there is no reasonable predictability that such lines will ever be used again. In fact, the weight of opinion and common sense is that this outcome is highly remote and virtually nil. There is no evidence anywhere that a "railbank" under section 1247(d) has ever resulted in a resumption of service. No wonder the D.C. Circuit was "unable, therefore, to conclude that existing precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future." *NWF v. ICC*, *supra*, 850 F.2d at 708.

II. THE LOWER COURT ERRONEOUSLY HELD THAT ICC HAS CONTINUING JURISDICTION OF THIS MATTER

The court below held that section 1247(d) does not constitute a "taking" of private property in any circumstances because of the continuing jurisdiction of the

ICC over abandonment proceedings. As explained by the Second Circuit:

"The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment not appropriate, no reversionary interest can or would vest. Thus, petitioners' reversionary interest, if any, is not postponed any more by the operation of § 1247(d) than it could otherwise be affected by the ICC's continuing jurisdiction." ¹⁴

The Second Circuit had earlier stated that "[u]ntil the ICC issues a certificate of abandonment, the railway property remains subject to the ICC's jurisdiction, and state law may not cause a reverter of the property." ¹⁵

The analysis is faulty in at least two respects.

First, the conclusion is legally incorrect. It is precisely the extension of ICC jurisdiction over interim trail use by section 1247(d), when that jurisdiction would have terminated under 49 U.S.C. §§ 10903-10906, that constitutes the "taking" in these cases.

Section 1247(d) cannot even come into play unless the ICC has made a finding that present and future public convenience and necessity requires or permits abandonment or discontinuance of service. (See *Rail Abandonments—Use of Right-Of-Way as Trails*, Ex Parte 274 (Sub. No. 13), — ICC 2d —, decided April 16, 1986, p. 16). The requisite finding that abandonment is warranted must, therefore, be made as a condition precedent to application of section 1247(d). Without Rails-to-Trails, the line would be abandoned and a certificate would issue under 49 U.S.C. § 10904.

Without section 1247(d), any railroad easement would automatically be extinguished upon making the requisite

¹⁴ 853 F.2d 151.

¹⁵ 853 F.2d at 150.

finding and issuing the certificate of abandonment as required by law. "Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the statutes, they would not." *National Wildlife Federation v. ICC*, 850 F.2d 694, 705 (D.C. Cir. 1988) quoting *Lawson v. State of Washington*, 730 P.2d 1308, 1313 (1986). "But-for" section 1247(d), the easements would have lapsed and the full use of the right-of-way would have returned to the landowners. The postponement of the return of the property, for purposes unrelated to railroad use is the very essence of the "taking" argument in this case. Yet both the ICC and the Second Circuit below acknowledge that this is precisely what was intended.

Federal preemption or the question of continuing ICC jurisdiction "is neither the issue nor the answer, however," ¹⁶ Instead, the "sole issue here in dispute is the ICC's determination that reversionary owners whose property interests are defeated by the preemptive effect of the Trails Act . . . upon state laws are not entitled to compensation." ¹⁷

Rather than being a *defense* to the Fifth Amendment "taking" claim, the continuing ICC jurisdiction and the preemptive effect of the Trails Act are the *very vehicles by which the "taking" occurs*. "But-for" these two factors, any railroad easement would now be extinguished, the abandonment would be complete upon the ICC finding of public convenience and necessity as required by the Transportation Code, and the landowners would now be enjoying their property.

Secondly, the opinion of the court below that there can be no taking under section 1247(d) because ICC has con-

¹⁶ *NWF v. ICC*, 850 F.2d at 705.

¹⁷ *Id.*

tinuing jurisdiction is factually erroneous. The procedural nature of this matter indicates that ICC does not have jurisdiction of this matter any more.

In fact, this matter proceeded on the application of the carrier for an *exemption* from the formal abandonment procedures and continuing jurisdiction by the ICC, an application which the ICC approved.

The exemption process is an expedited procedure under which a railroad can effectuate an abandonment or discontinuance of service without formal ICC review and approval under 49 U.S.C. 10903-10905.

49 CFR 1152.50 describes this process. An abandonment or discontinuance is exempt if no local traffic has moved over the line for at least 2 years, any overhead traffic can be re-routed over other lines, and there is no formal complaint filed regarding cessation of service [49 CFR 1152.50(b)]. The ICC determined that these conditions were met in this case.

The upshot of this procedure is that the railroad may abandon or discontinue service virtually on its own motion, rather than waiting for the ICC to make formal findings, hold formal proceedings, and issue a formal Certificate of Abandonment.

Under procedures set forth in 49 CFR 1152.50(d), the railroad files a verified Notice of Exemption with the ICC at least 50 days before the abandonment or discontinuance is to be consummated. Within 20 days of receipt, the ICC publishes a notice in the *Federal Register*, and the "exemption will be effective 30 days after publication (unless stayed pending reconsideration)." 49 CFR 1152.50(d)(3).

The ICC illustrates the effects of this exemption procedure and its differences with regulated proceedings as follows:

"We do not issue abandonment certificates in exemption proceedings. Rather, the Notice of Exemption

that is published in the *Federal Register* is evidence of the railroad's authority to abandon. Thus, it is this Notice that will be the evidence of the line's status, and we will treat the Notice in same manner in exemption proceedings as we do the certificate in regulated cases."¹⁸

The record in this case indicates that the Notice of Exemption authorizing abandonment/discontinuance by Vermont Railway became effective February 15, 1986.¹⁹ As of that date, ICC jurisdiction in this matter terminated.

Under rules adopted subsequent to the Notice of Exemption in this case, the ICC provides for issuance of a Notice of Interim Trail Use (NITU) to the railroad and proposed trail user which supposedly condition the Notice on interim trail use. These regulations also provide that if interim trail use ends, the NITU should be turned in to the ICC for issuance of a new Notice of Exemption.

These rules, although not applicable to this proceeding,²⁰ attempt to retain some ICC jurisdiction over railroads which, by operation of law, are exempt from jurisdiction. This paradox is only one of many contradictions between orderly ICC abandonment authority and regulation (developed over years of statutory and jurispruden-

¹⁸ *Rail Abandonments—Use of Right of Way as Trails*, Ex Parte 274 (Sub No. 13), — ICC 2d —, April 16, 1986, p. 19.

¹⁹ See *State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption—In Chittenden County, Vt.*, 3 ICC 2d 903 (1987).

²⁰ The Notice of Exemption here became effective on February 15, 1986. The Decision announcing the Rails-to-Trails rules was published on April 16, 1986, and implementing regulations published in the *Federal Register* on May 7, 1986 (51 FR 16852). There is thus no way or procedure for ICC to attempt to continue any jurisdiction over this matter at the time Vermont Railway became exempt from ICC regulation.

tial evolution) and a trail development scheme that was hastily conceived and passed without even Commerce Committee review.

Nevertheless, the fact remains that the ICC had no continuing jurisdiction of this matter after February 15, 1986. The Notice of Exemption, having the same force and legal effect as a Certificate of Abandonment, terminates all ICC jurisdiction over the matter including any disposition of property. *Hayfield Northern Railroad Co., Inc. v. Chicago & Northwestern Transportation Company*, 467 U.S. 622, 104 S.Ct. 2610, 81 L.Ed.2d 527 (1984). It is true, as the ICC decision below noted, that *Hayfield* in dicta mentioned that postabandonment conditions may be imposed. However, the conditions in *Hayfield* were related to the possible purchase and resumption of rail service along the line by another railroad. Such conditions relate exclusively to maintaining rail service over the line. *Hayfield* does not, by any stretch of the imagination, purport to hold that a right-of-way may be transformed to a non-rail use such as trail use, or used for non-railroad purposes contrary to the express easement or interest of either the railroad or the abutting landowners.

The sole premise relied upon by the Second Circuit for holding that section 1247(d) does not "take" private property was therefore both factually and legally erroneous. As a result, the conclusion cannot be permitted to stand.

CONCLUSION

"Rails-to-Trails" is a thinly-disguised wolf in sheep's clothing. While its proponents attempt to justify it as a "railroad" statute, the overwhelming evidence—including its express terms, legislative intent and circumstances surrounding its enactment—conclusively shows a darker and more sinister purpose. It is nothing less than a legislative land grab to develop recreational trails at the ex-

pense of valid private property rights of landowners abutting abandoned railroad rights-of-way.

All state and federal courts that have considered the issue, save one, have seen through the disguise and refused to permit the carte blanche conversion of rights-of-way to trail use that conflict with the valid private property rights of the landowners. No court, save one, has conclusively said that "rails-to-trails" allows the unfettered trampling of these private property rights by trail users and by our government.

The Second Circuit below stands alone in being fooled by the act's disguise.

For the Second Circuit to validate section 1247(d) is to validate its lie. This Court recently cautioned against being taken in by an "exercise in cleverness and imagination" that permits the taking of private property without just compensation, in violation of the Fifth Amendment. Ignoring these warnings, the Second Circuit succumbed to the legislative Siren singing its tempting—but false—song.

Properly unmasked, section 1247(d) is exposed for what it really is—a blatant attempt to deprive landowners of their valid private property rights in order to build recreational trails. In order to negate these property rights that are defined by valid easements and protected by state law—a course of action which no other legislature or court has dared to take—it was necessary for Congress in section 1247(d) to make the illogical and inherently contradictory finding that recreational trails were a "railroad use." The utter nonsense of such a markedly unsupported statement is in itself enough to expose the true meaning and intent of section 1247(d).

We ask this Court to once and for all expose section 1247(d) for the true unconstitutional land grab that it is. Both justice and the law of the land through the

Fifth Amendment demand this exposé. It is time to put this scheme to rest once and for all.

Accordingly, we respectfully pray that the judgment below be reversed, and that the Rails-to-Trails statute, 16 U.S.C. 1247(d), be declared unconstitutional in its entirety as violating the Fifth Amendment prohibition against taking private property without compensation.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

J. PAUL PRESEALT AND PATRICIA PRESEALT,
Petitioners,
v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON, AND VERMONT RAILWAY, INC.,
- Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION
AND VERMONT FARM BUREAU FEDERATION AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-1076

J. PAUL PRESEALT AND PATRICIA PRESEALT,
Petitioners,
v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON, AND VERMONT RAILWAY, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION
AND VERMONT FARM BUREAU FEDERATION AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation and the Vermont Farm Bureau Federation respectfully file this brief *amici curiae*. Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of all the parties. Said consents are attached.

INTEREST OF AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursu-

ant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the United States. The largest general farm organization in the country, AFBF has member state organizations in 49 states (including Vermont) and Puerto Rico, representing the interests of more than 3.6 million member families.

The Vermont Farm Bureau Federation (VFBBF) is a non-profit general farm organization in Vermont, and a member state in the American Farm Bureau Federation. The purposes of VFBBF are to promote and protect the interests of agriculture across Vermont. VFBBF has 14 affiliated county Farm Bureaus and represents the interests of more than 4,130 member families throughout the state.

The protection of private property rights and the preservation of the sanctity of private property transfers and agreements is of paramount importance to farmers and ranchers. Many of those who are directly affected by the Rails-to-Trails, both in Vermont and throughout the country, are farmers and ranchers.

The Rails-to-Trails scheme strikes at the very heart of the notion of private property rights. By seeking to indefinitely postpone the property interests of these landowners—interests that were freely bargained for and defined by specific easement grants between their predecessors in title and railroads—the Rails-to-Trails scheme expressly denies those private property rights and alters the private bargains struck between those predecessors in title and the railroad.

The issue in this case is of paramount importance not only to farmers and ranchers but to every private property owner in the United States. An adverse decision that upholds such a blatant confiscation of the reversionary interests of private landowners would signal the beginning of the end of the protections afforded by the Fifth

Amendment prohibition against taking private property for public use without just compensation.

STATEMENT OF THE CASE

The facts in this case are as set forth by Petitioners. As stated by Petitioners, the issues before the court are presented in a "legally clean posture" and are such that they can be fully and completely resolved here.

INTRODUCTION

Dating from the mid-19th century, our country embarked on a national policy to develop a network of railroads to move both passengers and goods across the vast expanse of the United States.

In order to achieve that policy, it was necessary to elicit the cooperation of everybody. Before railroads could begin operation, they had to acquire rights-of-way which, in most cases, were to traverse privately owned property. That meant negotiating with the owners of this private property.

In the vast majority of cases, these negotiations led to the landowners granting easements for railroad use, with the understanding that the easements would terminate when railroad use terminated. On that basis, the easements were purchased.

In 1983, Congress passed the "Rails-to-Trails" Act, 16 U.S.C. 1247(d), which was expressly designed to alter these easements privately negotiated decades before. Instead of these easements ending when the railroad no longer used the rights-of-way, with the property then being returned to the landowners, section 1247(d) allows trail groups, a third party non-railroad entity, to assume the easement from the railroad for recreational trail purposes. The explicit intent and effect of the statute is to legislatively create another easement across the right-of-way for non-railroad purposes without the consent of

the landowner and without allowing him compensation for the loss of enjoyment of his property. The statute permits the railroad to retain the rights-of-way beyond the terms of the easement grants—in express derogation of the rights of the landowners—in order to transfer the rights-of-way to trail groups. The result is a situation that was not intended or expected by either of the original parties to the easement.

The Fifth Amendment to the United States Constitution prohibits the “taking” of private property for public use without just compensation. So long as the “taking” authority provides or allows just compensation, it is constitutionally valid.

But section 1247(d) does not provide or allow for just compensation to the landowners for the easement which it has legislatively created. It does not allow the landowners any choice. Rather, it is the railroad which decides to transfer the easement to trail use, and it is the railroad which receives any compensation.

The “budget crunch” and the mounting deficit of the United States government has been well publicized. One area that the federal government has targeted to reduce unnecessary monetary expenditures is the area of unexpected exposure to judgments from the payment of compensation for Fifth Amendment takings. The Department of Justice estimates that in one section of one of its divisions alone there are claims amounting to over \$1 billion.

To stem this potentially significant drain on the public fisc, President Reagan issued Executive Order No. 12630 in 1988. It directs all executive agencies and departments to carefully consider the impact of any proposed rule, action or policy on private property rights and to select the least intrusive alternative. The Executive Order thus reaffirms the commitment of the government to the protection of private property rights expressed in the Fifth Amendment as a national policy.

“Rails-to-Trails” falls squarely within the concerns addressed in the Executive Order. With the vast network of railroads across the country, and overwhelming number of railroad easements that are potentially affected by section 1247(d), the costs of providing just compensation, as well as the costs involved in litigating those claims, could be staggering.

ARGUMENT

I. SECTION 1247(D) VIOLATES THE FIFTH AMENDMENT PROHIBITION AGAINST TAKING PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

Other participants in this case have persuasively argued that section 1247(d) is an invalid exercise of the Commerce Clause because the purported “railbank” purpose of the act is nothing more than a pretext to allow the taking of private property rights for trail development, and the statute has nothing to do with valid interstate commerce objectives. Thus, they argue, the statute flunks the test espoused by *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). We believe this argument is sufficient to invalidate the statute.

But if the Court finds that section 1247(d) does not violate the Commerce Clause, the inquiry must nevertheless continue. For this Court also has developed a long, well-established precedent, dating from *U.S. v. Chicago, Minneapolis, St. Paul & P.R. Co.*, 282 U.S. 311 (1931), that the Commerce Clause is not absolute, but is subject to the Fifth Amendment prohibition against taking private property for public use without just compensation. Thus, a statute validly enacted under the Commerce Clause may still be invalidated if it runs afoul of the Fifth Amendment “taking” prohibition. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *Hodel*

v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981).

The court below held—as a matter of law—that section 1247(d) (“Rails-to-Trails”) never, under any circumstances, constitutes a Fifth Amendment “taking”. It is the only court of the several which have considered the issue to reach this result, and is squarely in conflict with *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988). (“We are unable, therefore, to conclude that existing precedent provides that the rights of those who have an interest in railroad property may be frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future.”)¹

Not even the United States government has gone so far as to say that section 1247(d) is not a “taking” of private property under the Fifth Amendment. See 54 *Fed. Reg.* at 8013 (1989).

Rather, the overwhelming weight of judicial authority is clear that “Rails-to-Trails” section 1247(d) *does* violate the FIFTH Amendment “takings” clause. The conclusion reached by the Second Circuit below is simply incorrect.

The Fifth Amendment provides “nor shall private property be taken for public use without just compensation.”

All parties agree that conversion of abandoned railroad rights-of-way for trail purposes is a “public use.” The issues to be resolved, therefore, are whether there is “private property” that is “taken” by section 1247(d), and whether the statute provides or allows for “just compensation.” If “private property” has been “taken,” and if the statute does not provide or allow for “just compensation,” then the statute is unconstitutional and must be invalidated. That is precisely what is happening here.

¹ 850 F.2d at 708.

A. “Private Property” is Defined By State Law

This Court has repeatedly held that “while the meaning of property as used in the Fifth Amendment was a federal question, ‘it will normally obtain its content by reference to local law.’” *United States v. Causby*, 328 U.S. 256, 266, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206 (1946), quoting in part *United States v. Powelson*, 319 U.S. 266 (1943). This “basic axiom” was reiterated in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

With regard to railroad rights-of-way, “the interest retained by a property owner whose land is subject to a railroad right-of-way will depend on the language of the instrument conveying, or of the state law creating, that right-of-way and on the applicable state law rules of construction.” *National Wildlife Federation v. ICC*, 850 F.2d 694, 703 (D.C. Cir. 1988).

As Petitioners ably demonstrate, the law in Vermont is that the railroad here acquired only an easement over the subject property for use as a railroad, subject to cessation of the easement and the return of full use of the property to petitioners upon cessation of the railroad use. Thus, according to Vermont law, the petitioners have the right to full use of the property once railroad use ends.²

But just as the nature of the property right is defined by state law, so also are the circumstances that trigger extinguishment of the easement or the reversion of these private property rights. See *NWF v. ICC*, *supra*, at 703, *McKinley*, *supra*, and *Schnabel*, *supra*.

² This is also the general law applicable in most, if not all jurisdictions. See e.g., *McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131 (Iowa 1985), *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986), *Schnabel v. County of DuPage*, 428 N.E.2d 671 (Ill. App. 1981), *Pollnow v. State Department of Natural Resources*, 276 N.W.2d (Wisc. 1979) and *Washington Wildlife Preservation, Inc. v. State of Minnesota*, 329 N.W.2d 543 (Minn. 1983).

B. Section 1247(d) "Takes" Private Property Rights

1. The "Rails-to-Trails" Scheme

Before we can analyze the "takings" implications of the Fifth Amendment, it may first be useful to analyze how this scheme works.

Our nation's railroad system was developed for the most part during the 19th century. This development passed through several phases, but the first thing necessary for railroads to do in any case before construction could begin was to acquire rights-of-way.

In some cases (most notably the transcontinental railroads of the 1860's) the land for the right-of-way was given to the railroad in alternating sections, with the railroad permitted to sell one section to private parties in order to finance construction.

The more common method of right-of-way acquisition was the type used in this case. The railroad would obtain—by condemnation or by grant—a right-of-way easement, for which a fee was paid. A standard easement, and the one condemned in this case, permitted the right-of-way for railroad uses only. The corollary understanding, and that which was evident in application of Vermont law and the application of state law in the cases cited above, is that once the railroad use or "purpose" ends, then the easement is extinguished and full use of the right-of-way returns to the landowner or his descendants. Such was the bargain and expectations when the easement at issue was granted in 1899.

The National Trails System Act was enacted in 1968 to encourage public recreational trails. Congress soon noticed a "problem" in this Act. That "problem" was well settled state property law, illustrated by *Pollnow* and *Schnabel*, which held that abandoned railroad rights-of-way automatically reverted to the private property owners under grants of easements dating from the last century, which somehow interfered with trail develop-

ment.³ To allow third party trail developers to seize the right-of-way, therefore, the reversionary interests of private landowners had to be defeated or, at best delayed.

Thus, Congress enacted section 1247(d), which stated that "such interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." By preempting settled state law, this statute would purportedly defeat the rights of private owners to reclaim their rightful property upon abandonment by the railroad.

Congress stated that this was the "key element" in its trail development scheme.

"This finding alone should eliminate many of the problems with the program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use."⁴

Section 1247(d) then directed that "the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance *inconsistent or disruptive of such use.*" (Emphasis added.)

The ICC speaks even more bluntly:

"This language demonstrates that the main purpose of this amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreational

³ Neither Congress nor the proponents of 1247(d) considered that trails could, or should, be negotiated from the reversionary landowners.

⁴ H.R. Report No. 98-28, 98th Cong., 1st Sess. p. 8.

use when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interest."⁵

In that same decision, ICC states: "This language, and its legislative history, express congressional intent to preempt state property law that might otherwise require a reversion of rights-of-way upon the discontinuance of rail operations, as occurred in *Pollnow* and *Schnabel*."⁶

Section 1247(d) thus expressly postpones the extinguishment of privately negotiated easements granted for railroad purposes, to expressly allow third-party non-railroad interests to use the right-of-way for trail purposes thereby explicitly defeating the terms of the original easement.

We submit that this postponement of the extinguishment of valid easements "takes" private property belonging to the true landowners.

2. Section 1247(d) "Takes" Petitioners' Property Under the Fifth Amendment

In holding that section 1247(d) may never, as a matter of law, constitute a "taking" the Second Circuit stated as its reason that the ICC jurisdiction continues and the reversionary interest does not yet mature. "This response may accurately describe the effect of [§ 1247(d)], but it does not resolve the question posed by petitioner Beres, namely, whether the postponement of a reversionary interest that would otherwise vest under state law constitutes a taking of private property for which just compensation must be made." *NWF v. ICC*, supra, at 704.

⁵ *Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte 274 (Sub. No. 13), — ICC 2d —, decided April 16, 1986, p. 7.

⁶ *Op. Cit.*, p. 9.

A fundamental principle of real property law is that a party cannot validly transfer an interest in property that it does not have. Another fundamental principle is that the property interest that one has is defined by the deed and/or grant made to him.

In the case of railroad easements, the operative document is the easement grant itself. Where as in this case, the easement is granted for railroad use, it is extinguished when the railroad no longer uses it for railroad purposes. Upon such event, the railroad has no power or authority to transfer a right-of-way because it no longer has an interest in that right-of-way. This is the starting point for our analysis.

Both section 1247(d) and the ICC decision below seek to alter these property rights that are defined in the easement grant. The ICC itself notes: "Inevitably, interim trail use will conflict with the reversionary rights of adjacent landowners, but that is the very purpose of the Trails Act."⁷

It is also a fundamental principle of constitutional law that where the federal government seeks to defeat an established real property right of one person and give it to another, then it constitutes a "taking" to which the Fifth Amendment is applicable.

Moreover, since private property for Fifth Amendment purposes is defined by state law, any statute such as section 1247(d) which expressly seeks to alter state property rights must be viewed as a virtual *per se* taking.

By postponing a landowner's enjoyment of his property by allowing interim trail use, section 1247(d) effectively creates a new easement across Petitioners' property. There is no question that "easements" are property sub-

⁷ See *State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption—In Chittenden County, VT*, 3 I.C.C. 2d 903, decided July 7, 1987.

ject to the Fifth Amendment. *U.S. v. Causby*, supra. Recently, in *Nollan v. California Coastal Commission*, supra, 97 L.Ed.2d 677, 685 (1987) this Court stated:

"Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest . . . is to use words that deprive them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them."

The Court went on to say that "Perhaps because this point is so obvious, we have never been confronted with a controversy that required us to rule on it."

This case presents that "controversy."

The appropriation of an easement as described above is precisely what section 1247(d) accomplishes.⁸ This

⁸ This case is not as close as *Nollan*, and a brief look at some of the differences might allay some of the *Nollan* dissenters concerns. First, as well shown *infra*, this is a physical property invasion, not a regulatory "taking". Thus "investment backed expectations" do not come into play here. Secondly, where the *Nollan* easement was a condition of a permit, there is no such factor here. The *Nollan* dissent was troubled that the Nollans were on notice of the conditions at the time of their permit application and the state did not seek "to interfere with any pre-existing property interest." 97 L.Ed.2d 701 (Brennan, dissenting). Here, by contrast, the "pre-existing property interest" was created 87 years prior to the ICC decision and 84 years prior to the statute. The grantors of the Preseault easement could not have been on notice of the "Rails-to-Trails" restriction. Further, unlike the Nollans, the Preseaults could not have chosen to abide by the condition. Under "Rails-to-Trails," the landowner has no voice as to whether the trail use occurs or whether his property interest is postponed—that decision is solely the province of the trail developer and the railroad, nei-

case presents the opportunity to once and for all lay to rest the "obvious point" that appropriation of an easement as accomplished by section 1247(d) violates the Fifth Amendment.

Section 1247(d) permits a third party to physically take control over the right-of-way for use by the public. This court has repeatedly and consistently held that "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion . . ." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 2659 (1974); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. —, 96 L.Ed.2d 250 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto* reiterates that physical invasions are takings "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. 434-35.⁹

The Court has recently stated:

"We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."¹⁰

The Court might very well have been describing a recreational trail created under section 1247(d), because that is precisely the situation.

The fact that the landowner's interest may not be permanently taken, but is merely "postponed," as the ICC

ther of whom under state law would any longer have any interest in the right-of-way.

⁹ The economic impact to the Nollans was another factor that concerned the dissenters, which is not present here.

¹⁰ *Nollan*, supra, 97 L.Ed.2d at 686.

characterizes the impact to Preseaults in its decision below, does not lessen the Fifth Amendment implications. A "temporary" taking is still a taking. *First English*, supra.

The argument that the reversionary interest may be merely "postponed" and not permanently "taken" is "manifestly contrary to the underlying economics— analogous to saying that a lessor's interest in his property has not been 'taken' when the term of a fully paid leasehold is extended indefinitely." *NWF v. ICC*, supra at 704. The D.C. Circuit, therefore, found it "not surprising that a number of sources suggest it is unsound, particularly when the event that will trigger the reversion of the interest is imminent at the time of the appropriation." *Id.*

The *Lawson* court, construing a state "rails-to-trails" scheme of sorts, found that such an argument "strains credulity."

Nor does federal pre-emption of state laws to provide for ICC jurisdiction over the action offer any defense. For it is *precisely* the federal preemption of state reversionary property interests that has effected the taking. "Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the statutes, they would not."¹¹

Thus, to say as did the Second Circuit that federal pre-emption validates the "Rails-to-Trails" scheme is to acknowledge its lie. "But-for" the section 1247(d), Petitioners would have full use and enjoyment of their property. As a result of the statute, they do not. Therein lies the "taking".

¹¹ 730 P.2d at 1313. This was also quoted approvingly in *NWF v. ICC*, 850 F.2d at 705.

C. Section 1247(d) Does Not Provide or Allow For Just Compensation to Landowners, And Is Therefore Invalid

The "takings" clause of the Fifth Amendment provides that private property may not be taken "without just compensation." Thus, where just compensation is available or provided as a remedy, a "taking" will not be unconstitutional. *First English*, supra.

But just compensation is not the *only* remedy for a Fifth Amendment "taking". The Tucker Act compensation remedy is available only where the challenged statute is capable of co-existence with the Tucker Act remedy, and where the Tucker Act remedy has not been withdrawn by the challenged statute. See *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 (1984).

This co-existence is not found in all cases, however. Finding that "Congress made no provision for the payment of compensation to the owners of the interests covered by § 207," this Court recently invalidated the offending § 207 of the Indian Land Consolidation Act in *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 1080, 95 L.E.2d 668 (1987).

Here, as in cases such as *Ruckelshaus* and *Irving*, the statute is silent on the issue of whether just compensation is provided or allowed. Thus, the Court is left to infer whether or not section 1247(d) provides or allows a just compensation remedy.

An examination of section 1247(d) shows that it is akin to *Hodel v. Irving*, with no just compensation remedy either permitted or allowed to landowners.

In analyzing this aspect of section 1247(d) we ask the Court to keep in mind that "the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire

linear rights-of-way to recreational use when the rights-of-way have been operated under easements for railroad purposes.”¹² There can thus be little doubt that Congress knew exactly what section 1247(d)’s impact on reversionary landowners would be. Accordingly, any inference to be drawn regarding the availability of a just compensation remedy must be viewed against this backdrop.

In the first place, for a statute which has such major exposure to the United States in terms of possible payment for reversionary interests of affected landowners, section 1247(d) is unusually cheap. Not only did Congress express its intention that the rails-to-trails scheme operate at extremely low cost,¹³ but it also expressed a clear intention that no expenditures under the Act be made unless specifically appropriated. On the other hand, to allow a just compensation remedy that commits the U.S. Treasury to payment for inversely condemned landowner interests with no governmental control over the amount or location of the property thus condemned would absolutely destroy the fiscal responsibility woven in the statute.¹⁴

Secondly, the entire section 1247(d) scheme is geared toward the transfer of the right-of-way from the *railroad*

¹² *Rail Abandonments—Use of Right-of-Way as Trails*, decision served May 6, 1986 p. 7.

¹³ See House Report No. 98-28 and Senate Report No. 98-1.

¹⁴ The fact that compensation awards might come from a federal “Judgment Fund” does not alter the conclusion. The legislation and its legislative history are clear that the costs of the rails-to-trails “program” were to be low. Moreover, the Judgment Fund is not a bottomless pit. Recoveries from the Fund are in many cases charged back against the budget of the agency or program which occasioned the taking. Regardless, the funds to compensate landowners for their lost reversionary interests must come from *some-where* in the Treasury out of collected funds. The use of these funds will necessarily reduce expenditures in other areas. Thus, the Petitioners’ argument regarding fiscal integrity is both valid and persuasive.

to the trail user, not from the reversionary landowners. Section 1247(d) provides for the transfer of an abandoned line by “donation, transfer, lease, sale or otherwise” to the trail user. Since Congress took great pains to say that interim trail use is not an “abandonment for railroad purposes,” and since the key element of the section was to take away the reversionary interests of private landowners when they otherwise have come to possession, the logical inference is that the transferor of the right-of-way is contemplated to be the abandoning railroad. Such an interpretation was confirmed in the ICC “Rails-to-Trails” rules.

Thus, under the “Rails-to-Trails” scheme mapped out by Congress and the ICC, a trail user would be able to obtain—by “donation, transfer, lease, sale or otherwise”—the right-of-way from the railroad. This often entails payment by the trail user to the railroad.

To engraft a “just compensation” requirement on section 1247(d) would mean that compensation would have to be paid *twice* for the same right-of-way. Not only would the federal government be required to pay just compensation to the reversionary landowners for “taking” their interests, but the trail user would also still be liable to the railroad for any payment that it might require for interim trail use under the terms of section 1247(d).

We do not think that Congress intended such a result, nor would it be reasonable to infer double payment for each right-of-way.

In analyzing section 207 of the Indian Land Consolidation Act of 1983 in *Hodel v. Irving*, *supra*, Justice Stevens and Justice White in concurrence wrote that Congress could have approached the problem of fractionalized Indian interests in a number of ways, including condemnation and payment of just compensation.

Congress chose not to follow that approach with § 207, and the statute was subsequently invalidated.¹⁵

So, too, in section 1247(d) Congress could have addressed the issue of postponing the reversionary interests of landowners in a number of ways. For a statute which specifically was passed to alter the property rights of abutting landowners, Congress could have provided that a trail user must pay the landowners whose reversionary interests are explicitly and detrimentally altered as a condition of trail use. This would have preserved a "just compensation" remedy.

Instead, Congress elected to provide in section 1247(d) that the *abandoning railroad* be compensated for the interim use of the right-of-way. By choosing this approach, Congress has specifically withdrawn the "just compensation" remedy to the landowners. As we have seen, to now find a "just compensation" remedy would lead to the illogical and absurd conclusion that each right-of-way would have to be paid for twice.

We suspect that the truth of the matter is that "Rails-to-Trails" must necessarily steamroller the reversionary interests of the landowners and deny them "just compensation" in order to work." As we have demonstrated above, the state of the law in most states before section 1247(d) would have required just compensation for taking the reversionary interests of the abutting landowners. The very premise of section 1247(d) is continued railroad ownership of the right-of-way. As such, the statute must necessarily encompass a right of the railroad to dispose of it. To allow or infer "just compensation" to the landowners would therefore destroy the basis upon which section 1247(d) is premised. *The very fact of en-*

¹⁵ Justice Stevens and White ultimately based their concurrence on the basis that § 207 violated the Due Process Clause of the Fifth Amendment, not the Takings Clause.

actment of section 1247(d) to change the existing law necessarily involves a denial of "just compensation."

One other factor indicates the unavailability of the "just compensation" remedy in section 1247(d). Both the statute itself and implementing ICC regulations demonstrate that interim trail use may only occur upon the initiative of a trail developer. The role of the ICC in such cases is limited to "impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

The role of the ICC is merely as a conduit to effect transfers under the Act, and nothing more. The ICC has stated:

"To recover under the Tucker Act, the Government must be authorized by Congress to take the action giving rise to the Tucker Act suit. We have concluded that the Trails Act does not authorize condemnation of rights-of-way."¹⁶

In that same decision, the ICC says: "The landowners' fee interests cannot be taken under the Trails Act because the power to condemn *any interest in land* has not been delegated to us under the statute."¹⁷

Without the authority to condemn, a "just compensation" remedy is not available.

Moreover, since the ICC does not have the authority to choose which rights-of-way would be subject to trail use, any "inverse condemnation" action would likewise be untenable. Since only trail groups have the authority to initiate trail conversions under section 1247(d) any just compensation for inverse condemnations would be

¹⁶ *Rail Abandonments—Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub. No. 13) decided Aug. 13, 1986, p. 5.

¹⁷ Op. Cit. p. 4.

based solely at the discretion of trail users to seek interim use. Such a result would effectively put the U.S. Treasury at the disposal of trail groups, and would effectively delegate condemnation authority (albeit inverse condemnation) to trail users.

Again, we do not believe this is what Congress intended, especially when the condemnation authority has been withheld from ICC.

It is not surprising then that the D.C. Circuit which considered section 1247(d) concluded: "The language of section 8(d), however, not only does not authorize the Commission to 'condemn' or to 'take' railroad property, it does not specify any procedures to be used in appropriating such property and provides no guarantee of just compensation."¹⁸

For a statute whose main purpose is to prevent the reversionary interests of landowners upon abandonment of certain railroad rights-of-way, section 1247(d) is strangely silent about providing just compensation for such "takings". In fact, to even imply the existence or availability of a "just compensation" remedy leads to absurd and illogical results.

The only valid conclusion that can be drawn from section 1247(d) is that Congress did not intend to provide or allow the landowners "just compensation" for the taking of their property. As such, and to prevent the absurd results described above, the appropriate remedy here is complete invalidation of section 1247(d).

II. SECTION 1247(d) IS INVALID ON ITS FACE

The Second Circuit held that section 1247(d) can never, as a matter of law, constitute a taking. But the opposite is true. We submit that operation of 1247(d) by its very terms and intent, *always* constitutes an unconstitutional taking.

¹⁸ *NWF v. ICC*, 850 F.2d at 700.

We have demonstrated supra that section 1247(d) is an unconstitutional taking of the reversionary interests of private landowners with interests in abandoned railroad rights-of-way, for public use without just compensation. As we have further demonstrated, the "taking" occurs by the preemption and conscious alteration of state law which would otherwise grant an immediate possessory interest to abutting landowners, by finding that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way, for railroad purposes." The taking is effected by withholding otherwise valid abandonments to prevent the landowners' interest from immediately becoming possessory so that the right-of-way could be used for recreational trail purposes. We have further demonstrated that the primary purpose of the Act, as expressed by both Congress and the ICC, is to prevent the reversionary interests of landowners from interfering with recreational trail development.

With these facts in mind, an examination of the statutory language itself as well as circumstances surrounding enactment of section 1247(d) conclusively show that the statute is invalid on its face.

The first prong of the taking here is the pre-emption of settled state real property law, as well as the express terms of private easements negotiated decades ago, which provide that easements granted "for railroad purposes" automatically extinguish upon abandonment by the railroad. The "problem" in implementing trail development that Congress sought to address in section 1247(d) was presented by state court decisions such as *Pollnow*, *Schnabel*, *McKinley*, *Lawson*, and *Washington Wildlife* that construed railroad easements according to the four corners of the document and refused to extend the terms of the easement beyond what the parties had agreed upon.

In 49 U.S.C. 10906, Congress had already provided the ICC with a means to acquire abandoned rights-of-way for "public use," which presumably included recreational

trail use. While this section was useful in conversion of some "rails-to-trails"¹⁹ both Congress and trail developers wanted more. The "problem" with section 10906 was that it only applied if the easement itself permitted conversion to a "public use." But a large number of railroad easements were limited to "railroad purposes" and state courts held that under state law section 10906 was inadequate to convert such easements.²⁰

In order to satisfy the greed of trail developers, Congress was forced to do what no state court or legislature had ever done—alter the rights of privately negotiated railroad easements to diminish the rights of the grantor-property owners. Hence the statute expressly states that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."²¹ That this is the effect and intention of this provision is validated by the ICC admission that "pre-emption, the key feature of the Amendment, applies only to rights-of-way held and operated under easements, or subject to rights of reversion."²²

The second prong of the unconstitutional taking—withholding of final abandonment even after the ICC finds that "present or future public convenience and necessity" requires or permits it—is equally limited in its scope and application.

By its express terms, section 1247(d) does not operate with regard to all railroad abandonments. Rather,

¹⁹ Such as in *Washington Wildlife*.

²⁰ *McKinley* went so far as to hold that section 10906 did not pre-empt Iowa law.

²¹ This statement in and of itself, given the circumstances surrounding section 1247(d), is enough to find a *per se* taking. Such a finding is also inherently illogical and patently contradictory, but necessary in order to squelch the private reversionary interests.

²² *Rail Abandonments*, decided April 16, 1986, *supra*, at p. 8.

section 1247(d) only provides that "the Commission . . . shall not permit abandonment or discontinuance *inconsistent or disruptive of such [interim trail] use.*" (Emphasis added) As indicated *supra* in our brief, those situations where abandonment or discontinuance would be "inconsistent or disruptive" of trail use were, according to Congress, cases where state law would provide that private reversionary interests would become possessory upon abandonment.²³

Thus, section 1247(d), by its express terms and plain meaning, only applies to one class of situations—where private property reversionary interests would otherwise become possessory if the railroad right-of-way were abandoned according to traditional ICC abandonment authority. Yet these are the very situations where the "takings" occur. Section 1247(d) was specifically designed and is expressly limited to situations where existing law—both state and federal—and state court decisions give effect to the four corners of an easement grant.

The ICC itself acknowledges this limited scope of section 1247(d). In its decision implementing its regulations, the agency actually gave advice as to when to invoke section 1247(d):

"Thus, if a trail proposed only involves property *owned* by the carrier, and the trail developer does

²³ We should point out that this postponement of abandonment or discontinuance also constitutes a Fifth Amendment "taking" since it purports to deny private property rights in a manner that is inherently contradictory to established ICC abandonment authority.

Sections 49 U.S.C. 10903-10904 specifically require ICC to issue certificates of abandonment upon a finding that "present or future public convenience and necessity" requires abandonment. Yet section 1247(d) can only be invoked after the ICC makes this requisite finding in favor of abandonment. By seeking to retroactively extend ICC jurisdiction, and thus defeat valid private property rights, section 1247(d) is a taking much in the same way it is by seeking to pre-empt and alter state property laws.

not want to risk losing the right-of-way to restored service, section 1247(d) should not be invoked. Rather, the trail developer should let the railroad consummate abandonment and then purchase or lease the right-of-way from the railroad . . .

"On the other hand, if part or all of the involved right-of-way is held under an easement or reversionary interest, the trail developer would need to invoke section 1247(d) to prevent reversion of the easement property and maintain the integrity of the transportation corridor."²⁴

While not dispositive of our proposition that section 1247(d) is invalid on its face, this ICC interpretation is nevertheless relevant, especially since the role of ICC is only to determine when the Trails Act is applicable. See *Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, decided December 2, 1987.

In *National Wildlife Federation v. ICC*, supra, the D.C. Circuit carefully analyzed the Act and its rules. Instead of making a specific finding of whether or not the rules were unconstitutional, the court instead remanded the matter to ICC to review its own rules for possible takings. The court directed that the agency "should give special attention to situations where the right-of-way is strictly limited to railroad use and the restoration of rail service in the future is not foreseeable."²⁵ Yet, these are precisely the situations covered by the express language of the statute.

Because the application and operation of section 1247(d) is expressly limited to those very situations where the unconstitutional "takings" occur, it is, and must be declared, unconstitutional on its face.

²⁴ *Rail Abandonments*, Ex Parte No. 274 (Sub No. 13) decided April 16, 1985, p. 8.

²⁵ 850 F.2d at 708. ICC subsequently declined to make the review ordered by the court, and the matter is now on appeal.

CONCLUSION

Ninety years ago, Petitioners' predecessors in interest in good faith granted a right to a railroad to use its property to operate a railroad. That line stopped running 14 years ago.

Under the easement, Petitioners should now have their property back. Yet when they tried to reclaim it they were prevented from doing so by a federal statute which decrees that the land now belongs to a trail group to use in a manner that has nothing to do with railroad use.

Section 1247(d) is a transparent and convoluted attempt to make sure that Petitioners are deprived of their private property rights in the right-of-way. To achieve that purpose, it had to make the illogical and inherently contradictory finding that recreational trail use is somehow a "railroad use."

The Fifth Amendment "takings" clause was specifically added to the U.S. Constitution to protect private citizens from having their property rights so blatantly and cavalierly trampled. Justice and the Fifth Amendment demand that section 1247(d) be invalidated.

Many courts—state and federal—have considered this issue of trail conversion. Only the Second Circuit below has validated the conversions and said that it does not constitute a "taking". By approving the procedure, the Second Circuit has validated its lie, and succumbed to its "exercise in cleverness and imagination" which this Court so recently rejected in such cases.

Therefore, we pray that the judgment below be reversed, and that section 16 U.S.C. § 1247(d) be declared unconstitutional in its entirety as violating the Fifth Amendment prohibition against taking private property for public use without just compensation.

Respectfully submitted,

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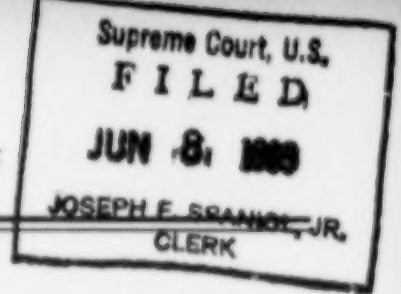
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AMICUS CURIAE

BRIEF

(11)
No. 88-1076



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,

Petitioners,

v.

**INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON, and VERMONT RAILWAY, INC.,**

Respondents.

**On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Second Circuit**

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF REALTORS®
IN SUPPORT OF PETITIONERS**

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No. 88 - 1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

v.

**INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON, and VERMONT RAILWAY, INC.,**
Respondents.

**On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Second Circuit**

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF REALTORS®
IN SUPPORT OF PETITIONERS**

All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this *amicus curiae* brief in support of Petitioners. These consents are filed herewith.

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of approximately 750,000 persons engaged in all phases of the real estate business.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of the problems encountered by real property owners for over three quarters of this century. Through its long and undeviating commitment to the protection of the rights and interests of property owners, NAR has earned the right to speak not only for real estate professionals but for all American property owners.

Of fundamental importance to NAR is the preservation of the private property rights established by the United States Constitution. This commitment to safeguarding private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real property.

INTEREST OF AMICUS

The interest of NAR in this case arises from its concern that the rights of private property owners be shielded from confiscation by the actions of government.

Development and maintenance of the complex infrastructure necessary to sustain our expanding society places a relentless burden on available public financial resources. Regrettably, governments have succumbed to the temptation to take "short cuts," and have legislatively appropriated private property for use for public purposes, without compensating the owners of such property. This case presents a glaring example of such governmental action, and an important opportunity for this Court to remind and admonish governments that public purposes must be achieved using public resources and the rights of private property owners must be respected and preserved.

While Section 8(d) of the National Trails System Act Amendments of 1983 may be a commendable attempt to expand public recreational facilities, those public benefits should not and may not be secured by blatant disregard for and seizure of the property rights of owners of reversionary rights to railroad right-of-way easements. The Takings Clause of the Fifth Amendment requires that, as stated in the 1989 NAR Statement of Policy, "the cost of benefits to the general public shall be borne by the general public."

NAR does not propose to duplicate the arguments ably presented in Petitioners' Brief, but endorses and urges this Court to adopt that reasoning. Further, to avoid unnecessary repetition, NAR adopts the statement of the

case set forth in Petitioners' Brief. NAR's purpose in submitting this brief *amicus curiae* is to emphasize to this Court the manner in which this statute unconstitutionally dissolves private property rights, and the need for this Court now to address and eliminate this openly-acknowledged governmental appropriation of private property rights.

INTRODUCTION

NAR asks this Court to reverse the decision of the Second Circuit Court of Appeals and to declare Section 8(d) of the National Trails System Act Amendments of 1983¹ unconstitutional under the Fifth Amendment's Takings Clause.² This statute was expressly designed for the singular purpose of depriving owners of property subject to easements for railroad rights-of-way of their reversionary interests in such rights-of-way.

Section 1247(d) operates only to preclude the reversion of the right-of-way to the adjacent owner which would otherwise occur when railroad use is terminated. The deprivation of rights effected by §1247(d) constitutes a taking of those rights within the meaning of the Takings Clause. Although the interim trail use authorized by §1247(d) may only be for a limited period, this Court has recognized that temporary takings are not different than

¹ Pub.L. 98-11, §208, 97 Stat. 42, 48 (1983) (codified as 16 U.S.C. §1247(d)), (hereinafter "§1247(d)").

² The Takings Clause of the Fifth Amendment provides "[N]or shall private property be taken for public use, without just compensation."

permanent appropriations of property. In addition, the character of the intrusion authorized by §1247(d), that is, physical entry by the public for recreational purposes, is precisely that which this Court has uniformly condemned as prohibited by the Fifth Amendment. Consequently, §1247(d) must be stricken as unconstitutional, since it fails to provide compensation to the property owner.

Public purposes such as those intended by §1247(d), including both expanding public recreational facilities and preserving rail corridors for future use important to the national interest, may be achieved by either lawful or unlawful methods. In adopting §1247(d), Congress has regrettably chosen the latter. By holding §1247(d) unconstitutional, this Court will reaffirm that the lawful means to accomplishing such ends is for government to take only those private property rights for which it provides fair and reasonable compensation.

ARGUMENT

I.

SECTION 1247(d) WORKS AN UNCONSTITUTIONAL TAKING OF THE REVERSIONARY PROPERTY INTERESTS OF ADJACENT LANDOWNERS.

A. The Sole Effect Of §1247(d) Is To Deprive Owners Of Their Right To Reversion Of Railroad Rights-Of-Way.

Despite the language of §1247(d) regarding the national policy of preserving rail corridors, §1247(d) accomplishes no result other than to usurp the rights of owners of adjacent properties to reversion of railroad right-of-way easements and to convey those rights to trail users. This

is apparent from an analysis of §1247(d) and its legislative history, the legislative scheme of which §1247(d) is a part, and the rules adopted by the Interstate Commerce Commission (hereinafter "I.C.C." or "Commission") to implement this Section, including the I.C.C.'s decision adopting and modifying those rules.

Section 1247(d) was enacted in response to the perceived ineffectiveness of Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), P.L. 94-210, §809, 90 Stat. 144 (codified as amended at 49 U.S.C. §10906 and notes following (1982)). Section 809 directed the preparation of a report regarding alternative public uses of abandoned railroad rights-of-way, including recreational uses, and also directed the Secretary of Interior to provide financial, educational and technical assistance in the planning, acquisition and development of abandoned rights-of-way for such public purposes. Section 809(c), 49 U.S.C. §10906, also directed that in considering a petition for permission to abandon a rail line, when the "Interstate Commerce Commission finds . . . that the present or future public convenience and necessity require(s) or permit(s) abandonment . . . the Commission shall further find whether the rail properties are suitable for use for public purposes. . . ." Upon making such a finding, the Commission is authorized to prohibit any transaction affecting a right-of-way for up to 180 days unless the property has been offered for sale for public purposes. Among these public purposes is trail use as contemplated by §1247(d). *Id.*

Apparently unsatisfied by the limited success of Section 809 in providing opportunities and incentives to create recreational trails, Congress enacted Section 8(d) of the National Trails System Act Amendments of 1983, 16 U.S.C. §1247(d). In doing so, Congress recognized that railroad

rights-of-way were often granted under easements which would automatically terminate upon cessation of railroad use,³ and that therefore attempts to establish trails on rights-of-way where railroad use was abandoned would be frustrated by the extinguishment of those easements upon such abandonment. H.Rep. 98-29, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S. Code Cong. & Ad. News 119-20.

To solve this annoying problem, Congress made the oft-quoted "key finding" upon which §1247(d) is founded:

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes.

Id.

That is, despite state law providing otherwise and/or the ordinary meaning of words in the express covenants granting these rights-of-way, railroad use would be considered to continue so long as actual future railroad use was possible. On this dubious basis, Congress adopted the current language of §1247(d), which advances the fiction that use of a right-of-way for a *recreational trail* is deemed

³ The law of Vermont, applicable to the rights of Petitioners here, is to that effect. *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 318 A.2d 652 (1974); *Proctor v. Central Vermont Pub. Services Corp.*, 116 Vt. 431, 77 A.2d 828 (1951); *Dickerman v. Town of Pittsford*, 116 Vt. 563, 80 A.2d 529 (1951). A number of state courts in other jurisdictions have concluded likewise. *Lawson v. State*, 107 Wash.2d 444, 730 P.2d 1308 (1986); *McKinley v. Waterloo Railroad Co.*, 368 N.W.2d 131 (Iowa 1985); *Schnabel v. County of DuPage*, 101 Ill.App.3d 553, 428 N.E.2d 671 (1981); *Pollnow v. Dept. of Wisconsin Natural Resources*, 88 Wis. 350, 276 N.W.2d 738 (1979).

continuing *railroad* use. The I.C.C. succinctly captured the essence of Congress' semantic shell game when it adopted rules implementing §1247(d):

[T]he main purpose (of Section 1247(d)) is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreational use when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise (*i.e.*, but for §1247(d)) would be subject to reversionary interests.

Railroad Abandonments—Use of Rights of Way as Trails, 2 I.C.C. 2d 591 (1986) (hereinafter "Trails Act Rules").

This attempt by Congress to pretend that a railroad right-of-way has not been abandoned, when in fact it has, is nothing more than the "use (of) words in a manner that deprives them of all their ordinary meaning." *Nellan v. California Coastal Commission*, 483 U.S. ___, 107 S.Ct. 3141, 3145 (1987). Express covenants which convey railroad right-of-way easements and provide for reversion upon abandonment of railroad use, or state law which imposes the same condition on such easements, cannot simply be rewritten by Congress to eradicate the reversionary right. Thus, when trail use is, in fact, authorized pursuant to §1247(d) and an agreement between a trail user and the railroad, Congress cannot change the *fact* that railroad use has ceased nor the *fact* that state law operates to cause the adjacent landowner's reversionary rights to mature. Since trail use is necessarily exclusive of railroad operations and the former can begin only when the latter ceases, the reversionary rights of adjacent landowners inescapably and automatically mature when trail use begins. Thus, trail use pursuant to Section 1247(d)

does not, as the I.C.C. asserts,⁴ postpone or pre-empt the reversionary rights of landowners, it *seizes* those rights which have already vested.

This Court addressed a similar attempt to "pre-empt" state property law rights in *Ruckelshaus v. Monsanto*, 467 U.S. 986, (1984), where the EPA defended the registration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act⁵ by asserting that it pre-empted the state trade secret property rights of insecticide manufacturers. That Act authorized the EPA to disclose and use trade secret data submitted to it under express government assurances that it would remain confidential. This Court correctly dismissed the EPA's position and characterized that attempt to convert private property to public property "by *ipse dixit* . . . the very kind of thing that the Taking Clause . . . was meant to prevent." *Id.*, 467 U.S. at 1012, quoting from *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Equally without merit is the notion implicit in the language and the I.C.C.'s explanation of §1247(d) that railroad use "continues" sufficiently to defeat easement reversionary rights simply because of the purported future use of the right-of-way for railroad purposes. Although §1247(d) and its legislative history claim that a corollary objective is to preserve rail corridors for potential future railroad use, the means to that end are woefully inadequate to accomplish that result. Indeed, §1247(d) and the Trails Act Rules do nothing to effect the preservation of rail corridors or even to determine whether such preservation is warranted. Thus, for the reasons noted below, the assertion that §1247(d) trail use constitutes "railroad

⁴ *Trail Act Rules*, 2 I.C.C. 2d at ____.

⁵ 7 U.S.C. §136 et seq.

use," rather than abandonment, by retaining important rail corridors intact, must be rejected as pure sophistry.

First, the I.C.C. has concluded⁶ and the D.C. Circuit Court of Appeals has agreed⁷ that negotiation and execution of an agreement between a potential trail user and the railroad abandoning the right-of-way are entirely *voluntary*. Thus, accomplishment of the assertedly important public interest of "railbanking" is dependent on whether those parties choose to enter an agreement containing appropriate terms and conditions for use by the trail user. In particular, a railroad has no obligation whatsoever to convey the right of use to a trail user, and if the railroad elects not to do so, the line is abandoned and reversionary rights become vested. The significance of railbanking as an important public purpose is plainly belied by leaving it contingent on the fortuitous presence of an eager trail user and the willingness of the railroad to enter an agreement permitting use by that trail user.

Second, the legitimacy and importance of the railbanking objective is also undercut by the fact that even if a railroad is willing to enter into a trail use agreement, in the event that no agreement between the railroad and the potential trail user is reached within 180 days of issuance of a Certificate of Interim Trail Use or Abandonment, that Certificate automatically converts to a full certificate of abandonment.⁸ This results in final abandonment of the right-of-way and vesting of the adjacent owner's reversionary rights. Similarly, where a trail user who has

⁶ *Trails Act Rules*, 2 I.C.C. 2d at ____.

⁷ *National Wildlife Federation v. I.C.C.* 850 F.2d 694, 702 (D.C. Cir. 1988).

⁸ *Trails Act Rules*, 2 I.C.C. 2d at ____.

entered an agreement pursuant to §1247(d) later wishes to terminate that agreement and cease operation of the trail, he may do so simply by petitioning the I.C.C. to reopen the abandonment proceeding. The Commission will then issue a certificate of abandonment to the trail user and the railroad, and the right-of-way reverts to the adjacent property owner.⁹ In either case, reversion occurs without any consideration given to preservation of the rail corridor.

Third, despite the purported significance of "railbanking," §1247(d) *never* imposes upon the Commission any obligation to make a finding or even consider whether a particular right-of-way may be necessary or desirable for future rail use, or that there is any likelihood that such a necessity may arise.¹⁰ Indeed, the feasibility of interim trail use is considered only *after* the Commission has concluded, as required by 49 U.S.C. §10906, that "*present or future* public convenience and necessity require or permit abandonment. . ."¹¹ (emphasis added). Because the legitimate necessity of railbanking a particular corridor need not even be addressed when interim trail use is considered, one can only conclude that railbanking is a mere pretext, and not a genuine objective of §1247(d).

In short, where right-of-way easements include the adjacent owners' right of reversion upon cessation of railway operations, such abandonment must be measured by objec-

⁹ *Id.*; 49 C.F.R. §1152.29(c).

¹⁰ Commissioner Andre recognized the constitutional importance of the consideration of these issues, and that addressing them was necessary to sustain the "legitimacy of banking." *Railroad Abandonments—Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures* 1989 I.C.C. Lexis 39, 14 (Andre, dissenting).

¹¹ *Trail Act Rules*, 2 I.C.C. 2d at ____; 49 C.F.R. §§1152.28-1152.29.

tive facts demonstrating a railroad's *de facto* abandonment, such as termination of service and removal of tracks and other equipment. While the I.C.C. plainly has authority to regulate when such abandonment may occur,¹² it is not within the power of Congress to legislatively fabricate the utter fallacy that abandonment has not occurred, when in fact it has. Moreover, even assuming that a reversionary interest could be defeated by railbanking where a legitimate likelihood of future use of the rail corridor has been demonstrated, §1247(d) as implemented by the Commission is absolutely unable to effectively accomplish such "railbanking." Section 1247(d) thus serves exclusively to deprive adjacent property owners of their legitimate entitlement to reversionary interests in railroad rights-of-way, and no other purpose.

B. The Nature Of §1247(d)'s Appropriation Of Adjacent Landowners' Reversionary Rights Constitutes An Unconstitutional Taking.

Once it is recognized that §1247(d) has no genuine purpose other than to deprive adjacent landowners of their reversionary interests upon *de facto* termination of railroad operations, it is straightforward to further determine that such deprivation is of a character that constitutes a taking within the meaning of the Fifth Amendment. Because no compensation is provided by §1247(d), however, that taking is unconstitutional.

¹² The Commission has plenary and exclusive authority to regulate railroad abandonments. *Hayfield N. Railroad Co. v. Chicago & N.W. Transportation Co.*, 407 U.S. 622 (1964); *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

The "interim" nature of the appropriation of the reversionary rights of adjacent landowners under §1247(d), and the prospect that unencumbered use and enjoyment of such rights-of-way may be restored at some future time when trail use terminates, is of no consequence.¹³ As this Court held only recently in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 318 (1987), " 'temporary' takings . . . are not different in kind from permanent takings. . . ." In reaching that conclusion, this Court found "substantial guidance" in its earlier cases which embraced the principle that a compensable Fifth Amendment taking occurs, where, just as in the present case, "the government has only temporarily exercised its right to use private property." *Id*; See *United States v. Westinghouse Electric & Manufacturing Co.*, 339 U.S. 261 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Thus, the period of the interim trail use of the right-of-way is significant only in determining the *amount* of the constitutionally required compensation. Trail use on an interim basis is no less a taking.

Moreover, while this Court has recognized that "[T]he question of what constitutes a taking for Fifth Amendment purposes has proved to be a problem of considerable difficulty," *Pennsylvania Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978), not susceptible to a "set formula," *Goldblatt v. Hempstead*, 369 U.S. 590,

¹³ Since §1247(d) imposes no maximum length of time for "interim" trail use to continue, however, an adjacent owner has no guarantee whatsoever that trail use will ever terminate. One can quite reasonably expect that the most attractive, popular and conveniently located trails are likely to remain in use indefinitely.

594 (1962), government actions which create or authorize an actual physical invasion or occupation of private property have been uniformly declared to constitute takings within the meaning of the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. ___, 107 S.Ct. 3141 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Indeed, §1247(d)'s appropriation of reversionary property interests for trail use, "[W]here individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises," is precisely the type of "physical occupation" recently condemned as a taking by this Court. *Nollan*, 483 U.S. at ___, 107 S.Ct. at 3145. This Court's opinion in *Nollan*, in fact, quite aptly describes the circumstances now before this Court: "Appropriation of a public easement across a landowner's premises," is "no doubt a taking." *Id.* Since the railroad's right-of-way easement is extinguished when railroad operations cease, the trail use authorized by §1247(d) constitutes, in effect, the government's declaration and seizure of a new easement for that purpose, which is "no doubt" a taking. See also *Kaiser Aetna*, 444 U.S. at 180.

C. It Is Appropriate To Declare §1247(d) Facially Unconstitutional.

Once the stated but patently specious railbanking objective is set aside, it is clear that the only purpose that §1247(d) may ever serve is the deprivation of reversionary property rights in railroad right-of-way easements.¹⁴ Appli-

¹⁴ The Commission has conceded this to be the §1247(d)'s "main purpose". *Trails Act Rules*, 2 I.C.C. 2d at _____. Other than railbanking, no other purpose is even suggested.

cation of §1247(d) is invoked to authorize "interim trail use" only where the Commission has first determined that abandonment of a rail line is otherwise appropriate. Thus, while Petitioners' challenge to the facial unconstitutionality of §1247(d) arises out of their appeal of the Commission's dismissal of their petition for a Certificate of Abandonment, this case is nevertheless a "factual setting which makes such a decision necessary." *Pennell v. San Jose*, 483 U.S. ___, 108 S.Ct. 849, ____ (1988), quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981).

The appropriateness of declaring §1247(d) unconstitutional on its face is revealed by the manner in which that provision impacts these Petitioners and this case. A declaration that §1247(d) is unconstitutional would require consideration of the abandonment petition presented by the Preseaults to the Commission, since then the trail use agreement would not be sufficient to avoid abandonment of the right-of-way. The issuance of a certificate of abandonment must therefore be considered on the facts as they exist. On the contrary, if §1247(d) were valid, the Commission's dismissal of the petition for such a certificate would be entirely proper, since the trail use agreement between the State of Vermont and the City of Burlington would require that the right-of-way "not (be) treated . . . as an abandonment of such right-of-way for railroad purposes." 16 U.S.C. §1247(d).

Petitioners therefore present a concrete controversy raising the constitutional validity of §1247(d). Moreover, the mandatory language of §1247(d)¹⁵ and the fact that it is invoked only to deprive the adjacent owner of rever-

¹⁵ "(S)uch interim use *shall* not be treated . . . as an abandonment . . ." (emphasis added).

sionary rights suggests that this case is not unique. Section 1247(d) will have a uniform and identical effect as applied to any other railroad right-of-way proposed for abandonment but which is feasible for trail use. Perhaps because §1247(d) was designed and tailored to have precisely this unconstitutional effect, and only this effect, it is proper for this Court now to declare §1247(d) void on its face.

II.

THE PUBLIC PURPOSE OBJECTIVES OF §1247(d) MAY BE ATTAINED ONLY BY COMPENSATING PROPERTY OWNERS FOR THEIR RIGHTS THAT ARE APPROPRIATED.

Achievement of the asserted public purposes of §1247(d), that is, expansion of public outdoor recreational opportunities and preservation of existing railway corridors for possible future reactivation, would undeniably benefit the American public. Despite the government's "considerable latitude in regulating property rights in ways that may adversely affect the owners," however, *Hodel v. Irving*, 481 U.S. 704, 713 (1987), "It is axiomatic that the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321-22 (1987), quoting from *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The NAR Statement of Policy¹⁶ reflects this articulation of the

¹⁶ See Interest of Amicus, *supra* p. 3.

requirements of the Takings Clause: Public benefits shall be accomplished with public resources, and not with involuntary, uncompensated appropriation of private property. Confiscation of the reversionary rights of owners of land adjacent to railroad right-of-way easements by §1247(d) is unconstitutional unless the public, which reaps the benefits of such action, appropriately compensates those owners for their rights.¹⁷ The analogy between the application of §1247(d) and this Court's opinion in *Nollan v. California Coastal Commission*, 482 U.S. ___, 107 S.Ct. 3141, 3150 quite clearly directs this result: While enhancement of the National Trails System may be a "good idea," adjacent property owners should not be "compelled to contribute to its realization." If the government wishes to appropriate trail use easements to replace the railroad rights-of-way easements which are extinguished when actual railroad use ceases, it must acquire those easements by the constitutional method of paying for them. *Id.*; *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922); *Lawson v. State*, 107 Wash. 2d 444, 461, 730 P.2d 1308, 1317 (1986).

¹⁷ The rights-of-way seized by Section 1247(d) clearly have sufficient value to constitute property under the Fifth Amendment. *Trails Act Rules*, 2 I.C.C. 2d at ___, citing *Kansas City S.W. Railway Co. v. Arkansas Louisiana*, 476 F.2d 829 (10th Cir. 1973). Note also that Section 7(k) of the Trails Act Amendments acknowledges the value inherent in such rights-of-way and easements by confirming that donations thereof sufficiently "further a Federal conservation policy and yield a significant public benefit" to entitle the donor to a charitable income tax deduction. Pub.L. 98-11, §207(i), 97 Stat. 42, 48 (1983).

CONCLUSION

For the reasons set forth herein, NAR respectfully prays that the decision of the Second Circuit Court of Appeals below be reversed and §1247(d) be declared invalid under the Fifth Amendment.

Respectfully submitted,

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June 8, 1989

AMICUS CURIAE

BRIEF

JUL 6 1988

JOSEPH F. SPANIOLO,
CLERK

(12)
No. 88-1076

In The
Supreme Court of the United States
October Term, 1988

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,
v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
STATE OF VERMONT,
CITY OF BURLINGTON, and
VERMONT RAILWAY, INC.

Respondents.

On Writ of Certiorari from the
United States Court of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF
NATIONAL ASSOCIATION OF REVERSIONARY
PROPERTY OWNERS IN SUPPORT
OF PETITIONERS PRESEALT

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3/12/88

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QUESTIONS PRESENTED

I

WAS THE ENACTMENT OF 16 U.S.C. 1247(d) AN INVALID CONGRESSIONAL EXERCISE OF THE COMMERCE CLAUSE SINCE ITS INTENDED AND PRINCIPAL EFFECT IS TO TAKE PRIVATE PROPERTY FOR PUBLIC USE AS RECREATIONAL TRAILS WITHOUT PROVISION FOR PAYMENT OF ANY COMPENSATION?

II

DOES A 16 U.S.C. 1247(d) TRAIL USE AGREEMENT WHICH RESULTS IN A CHANGE IN USE OF A RAILROAD RIGHT-OF-WAY FROM RAILROAD TO TRAIL USE AND WHICH INDEFINITELY POSTPONES PROPERTY RIGHTS WHICH WOULD OTHERWISE VEST UPON CESSATION OF RAILROAD OPERATIONS RESULT IN A "COMPENSABLE" TAKING UNDER THE FIFTH AMENDMENT?

III

IS THE REMEDY OF A PROPERTY OWNER WITH A TAKING CLAIM ARISING OUT OF THE APPLICATION OF 16 U.S.C. 1247(d) LIMITED TO A CLAIM AGAINST THE U.S. UNDER THE TUCKER ACT, OR DOES THE OWNER ALSO HAVE A CLAIM AGAINST THE RAILROAD AND OTHER PARTICIPANTS IN A 1247(d) TRAIL USE AGREEMENT SINCE THOSE PARTIES, ACTING UNDER COLOR OF FEDERAL LAW, PARTICIPATED IN A FIFTH AMENDMENT TAKING?

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INTEREST OF AMICUS CURIAE.

The National Association of Reversionary Property Owners (NARPO) is a non-profit corporation under the laws of the state of Washington and was first organized in 1985 for the purpose of protecting the rights of property owners who may be divested of property rights as a result of the application of 16 U.S.C. 1274(d) and similar state and federal legislation. NARPO is on the Interstate Commerce Commission (ICC) register list and keeps informed on a daily basis of ICC activities involving proposed railroad right-of-way abandonments including those abandonments where a request has been made by a third party for issuance of a Certificate of Interim Trail Use or Abandonment (CITU). NARPO further acts as a "clearing house" of information for property owners, their attorneys and other interested parties who may be affected by the issuance of CITU's and is presently involved in several matters under consideration by the ICC involving both the issuance of specific CITU's and proceedings for both the promulgation and implementation of 1247(d) rules.

SUMMARY OF ARGUMENT

I

16 U.S.C. 1247(d) IS AN INVALID EXERCISE OF THE COMMERCE CLAUSE

16 U.S.C. 1247(d) ("1247(d)") was enacted for the primary purpose of pre-empting state property law which was proving to be an obstacle to the conversion of railroad rights-of-way to trail use upon abandonment of railroad operations. The "scheme" of 1247(d) is that in lieu of receiving a Certificate of Abandonment in an abandonment proceeding, a railroad can instead "bank" its right-of-way and allow "interim trail use". See H. Rep. No. 98-28, 98th Cong., 1st Sess. at 8-9. Rail-banking was simply the Congressional "pretext" used in order to give 1247(d) arguable validity under the Commerce Clause.

NARPO maintains that the lack of any real nexus between 1247(d)'s supposed commerce purpose (rail-banking) and its principal effect (conversion of private property to trail use without payment of compensation) makes this legislation an unconstitutional exercise of the Commerce Clause. Alternatively, NARPO suggests that 1247(d) would be an unconstitutional exercise of the Commerce Clause if it was applied in circumstances where the evidence suggests that restoration of rail use over the right-of-way in question is unlikely.

II

IMPOSITION OF A 16 U.S.C. 1247(d) TRAIL USE AGREEMENT MAY WORK A FIFTH AMENDMENT TAKING OF PRIVATE PROPERTY

A railroad often has only an *easement* in the right-of-way over which it operates. State and federal property law generally provide that such an easement is extinguished upon

abandonment of railroad operations. Conversion of a right-of-way to trail use under the scheme of 1247(d) indefinitely postpones the property rights which would otherwise vest upon abandonment of railroad operations. The fact that the "postponement" is supposedly serving a commerce purpose (rail-banking), and the fact that the taking may be less than permanent, do not make the taking any less compensable under the Fifth Amendment. See *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988) and *First Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378 (1987). NARPO maintains that the taking problem must be cured by the exercise, in advance, of the power of eminent domain.

III

THE U.S., AS WELL AS THE OTHER PARTICIPANTS INVOLVED IN A 16 U.S.C. 1247(d) TRAIL USE AGREEMENT, SHOULD BE LIABLE FOR ANY FIFTH AMENDMENT "TAKING" WHICH RESULTS THEREFROM

Agents of the federal government, as well as private and state parties, have been held to be subject to a *Bivens* type action where, acting under color of federal law, they have deprived third parties of a constitutional right. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The parties to a 1247(d) Trail Agreement are agents of the U.S. arguably implementing national rail-banking policy. The act of the ICC in issuing an order approving such an agreement (a CITU) is nothing more than a ministerial act. These facts support the proposition that a property owner who has suffered a taking should have a *Bivens* action (as well as other causes of action which may be available under state or federal law) against all participants in a Trail Use Agreement, private or public.

ARGUMENT

I

16 U.S.C. 1247(d) IS AN INVALID CONGRESSIONAL EXERCISE OF THE COMMERCE CLAUSE SINCE ITS INTENDED AND PRINCIPAL EFFECT IS TO TAKE PRIVATE PROPERTY FOR PUBLIC USE AS RECREATIONAL TRAILS WITHOUT PROVISION FOR PAYMENT OF ANY COMPENSATION

In 1976, with the enactment of what is now codified as 49 U.S.C. §10906 ("10906"), Congress first began its largely unsuccessful effort to encourage the conversion of abandoned railroad rights-of-way to public trails. 10906, in certain circumstances, require a railroad to negotiate for the sale of its right-of-way for public purposes for 180 days after issuance of a Certificate of Abandonment. The "problem" with 10906 is that in many instances railroads only hold an easement in their right-of-way and that under applicable state and federal property law these easements are extinguished upon abandonment of railroad operations. See *Burlington Northern Railroad — Abandonment — in King County, WA.*, ICC Docket No. AB-6 (Sub-No. 242) (June 14, 1985). Also see *Hayfield Northern Railroad v. Chicago & N.W. Transp.* 467 U.S. 622 (1984) at 634. Congress attempted to solve this "problem" with the enactment of 1247(d) which was a 1983 amendment to the National Trails Systems Act. 1247(d) avoided the easement and reversion problems which would otherwise occur upon abandonment of railroad operations by using the Commerce Clause to pre-empt state property law.

The court below stated that acts of Congress under the Commerce Clause are valid if both of the following exist:

(1) . . . there is any rational basis for a Congressional finding that the regulated activity affects interstate

commerce and (2) . . . the means chosen by [congress are] reasonably adopted to the end permitted by the Constitution . . .

Preseault v. ICC, 853 F.2d 145, 149 (2d Cir. 1988). No matter what the "test" there is simply not a sufficient "nexus" between the supposed "commerce" purpose of 1247(d) (rail-banking) and its principal effect (conversion of railroad rights-of-way to trails). The following facts illustrate the point that "rail-banking" was at most simply a "pretext" to accomplish the true goal of providing for the conversion of rights-of-way to trails:

1. In Congress 1247(d) was under the jurisdiction of the Senate Energy & Natural Resources Committee and the House Interior & Insular Affairs Committee *not* the Congressional Transportation Committees which generally have jurisdiction over transportation and railroad related legislation. See generally S. Rep., No. 98-1, 98th Cong., 1st Sess.

2. 1247(d) was offered and codified as an amendment to the National Trails Systems Act under Title 16 of the U.S. Code whereas Title 49 of the U.S. Code is the section devoted to transportation and railroad legislation.

3. The ICC has suggested that interested trail users may not want to proceed under 1247(d) if reversionary interests do not exist since any resulting trail use would be at the risk of restoration of railroad use. See *Rail Abandonments — Use of Rights-of-Way as Trails*, Ex Parte No. 274 (Sub-No. 13) (April 16, 1986), slip op. at 8 ("Trails Act Rules"). This comment certainly seems out of place if the true objective of 1247(d) was to preserve railway corridors through the "rail-banking" process.

4. The ICC has acknowledged that the main purpose of 1247(d) is to "remove reversion as an obstacle" to the

conversion of railroad rights-of-way to trail use. *Trails Act Rules*, supra at 7. This conclusion is supported by the legislative history of 1247(d). See H. Rep. No. 98-28, 98th Cong., 1st Sess. at 8-9:

The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. *The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes, there may be nothing left for trail use.* This amendment would insure that potential interim trail use will be considered prior to abandonment . . . (Emphasis added)

5. Rail banking is initiated by interested trail users (49 CFR 1152.29(a)) and ultimately lives or dies at the discretion of the carrier who has petitioned for abandonment. *National Wildlife Federation v. ICC*, 850 F.2d 694, 702 (D.C. Cir. 1988). Is it not rational to believe that Congress would have delegated the ability to "make or break" rail-banking to trail groups (who want trails — not rails) and carriers (who want to abandon their line) if the true purpose of 1247(d) was to carry out the national policy of preserving rail corridors for future use.

6. The ICC is not required to make any finding that the right-of-way would be suitable for possible restoration to railroad use. *National Wildlife Federation v. ICC*, supra at 707. In fact, a CITU was issued in the State of Missouri although the evidence before the ICC established that the right-of-way was subject to regular flooding and that a parallel line existed on the other side of the river — both suggesting that the possibility of future restoration of rail services was

extremely remote. See *Missouri-Kansas-Texas R.R. Co. Abandonment — In St. Charles, Warren, Montgomery, Callaway, Boon, Howard, Cooper and Pettis Counties, MO.*, ICC Docket No. AB-102 (Sub-No. 13) (March 6, 1987) and the Petition for Abandonment filed therein.¹

NARPO maintains that even if 1247(d) survives a constitutional Commerce Clause facial challenge it should not be blessed in advance with blanket constitutionality for every possible future application. If evidence before the ICC suggests that restoration of rail service is unlikely, what possible commerce purpose is served by imposing interim trail use? Certainly no one has contended that local trails which may be created under 1247(d) are within the realm of interstate commerce. In such a circumstance the "commerce" purpose would be so remote and speculative that application of 1247(d) should not be deemed a valid exercise of the Commerce Clause — especially in the circumstance where its application would deprive third parties of recognized property rights. At least one member of the ICC appears to share this opinion. Commissioner Andre, in a partial dissent to the decision issued by the ICC in response to the court ordered remand in *National Wildlife Federation v. ICC*, supra, made the following comments:

. . . one of the principal issues in this proceeding, which the majority fails to adequately address, is whether the "rail banking" purpose is sufficient to make the Trails Act

¹ Property owners claiming an interest in the right-of-way in the Missouri proceeding challenged the constitutionality of 1247(d). See *Glosemeyer v. M-K-T R.R.*, 685 F. Supp 1108 (E.D. Mo. 1988) appeal pending under No. 88-1863-EM (8th Cir.). (The District Court in *Glosemeyer* affirmed the rail banking notwithstanding the evidence that suggested future railroad use of the right-of-way was unlikely.)

valid regulation. The Commission's rules, as upheld by the majority, do not require any finding that resumption of rail service along a particular right-of-way is likely or even possible, nor do they provide for any procedure whereby reversionary owners may challenge such a finding. Yet, this is precisely the type of finding which a statute, and the Court require the Commission to make. (Emphasis added)

. . . The banking purpose must be at least arguably legitimate, and the possibility of future rail use must be grounded in reality.

Issues involving the legitimacy of banking can and should arise, and they should be addressed in every proceeding where a request for trails use has been made. They are important issues of both statutory implementation as well as issues of Constitutional importance. It is unfortunate that the majority has failed to adequately address this point.

Rail Abandonments — Use of Rights-of-Way as Trails — Supplemental Act Procedures, 54 Fed. Reg. 8011 (1989). ("Supplemental Trails Act Rules").

NARPO is of the opinion that 1247(d) is nothing more than a Congressional effort to confiscate, in the name of commerce, private property rights for "recreational" purposes.² It is somewhat surprising that Congress made little effort to hide this

² NARPO suggests that the rail-banking scheme is simply a "fiction". It is interesting to note the comments of one trail group which called rail-banking "... a complete myth if there ever was one, and both sides know it . . ." *Bay State Trail Riders Association, Inc. and Southern New England Trails Conference Newsletter*, Sept. 1986, at 2. The newsletter also made the following comment at 3:

A lot of this waffling is grounded on the language of the Act (Sec. 1247(d)) which, I understand, was purposefully obfuscated in order to get the thing through — "snuck-in", so to speak, by trails lobbyists . . .

intent since it is clear from the legislative history that the motive for this legislation was the fact that previous Congressional efforts (10906) to convert railroad rights-of-way to trail use had not been successful. H. Rep No. 98-28, 98th Cong. 1st Sess. 8-9.

Congress clearly was not interested in rail-banking when it passed 10906 and the accompanying legislation since the overall purpose of the legislation was to provide a more efficient vehicle for abandonment of rights-of-way — not their preservation. *Hayfield Northern R. v. Chicago & N.W. Transp.*, supra at 630. When it became apparent that 10906 did not result in a significant number of trail conversions because railroads did not have an interest to sell, Congress should have provided a means for compensating property owners if it wanted to continue with the trail conversion program. Instead, Congress devised "rail-banking" which is admittedly a clever scheme to accomplish without cost what could not be accomplished directly under 10906.³

Since the primary goal of 1247(d) is to convert railroad rights-of-way to trail use, and since trail use is the principal affect of the legislation, the most that can be said of rail-banking is that it is a "catalyst" hiding under the disguise of the Commerce Clause in order to brand it with legitimacy. NARPO hopes that this court will recognize that rail banking is simply a clever, but nevertheless unconstitutional "pretext" to

³ It is very unlikely 1247(d) will ever be invoked except in the instance where this is a non-carrier property interest to "defeat". If a carrier owns a fee in the right-of-way, it is unlikely it would "volunteer" for a 1247(d) conversion since the typical objective of a railroad abandonment is to liquidate unproductive assets. Similarly, a trail user would not desire to invoke 1247(d) if the railroad owned a fee in the right-of-way since the trail would be subject to the risk, however small, of restored rail service.

accomplish something earlier legislation did not; or at a minimum, interpret the statute to require that restoration of railway service must be reasonably foreseeable.

NARPO supports the contention made by Petitioners that 1247(d) is also an unconstitutional use of the Commerce Clause since it interferes with property rights protected by the Fifth Amendment. It is beyond the scope and page limitation of this amicus brief to discuss this issue in detail, but NARPO is aware of authority which supports this proposition. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). (In *Kaiser* the federal government imposed regulations which required that a private marina be opened to the public on the basis that the marina was a navigable water subject to regulation under the Commerce Clause. This court reversed the appellate court decision upholding the regulation and stated that the government must invoke its "eminent domain" power and pay just compensation if it wanted the marina to be open to the public).

The court in *Glosemeyer v. M-K-T R.R.*, *supra*, took a different approach by holding that the Commerce Clause could be used to effect a "taking" by pre-empting state property law. The court addressed the taking issue by stating that property owners could seek relief in the Court of Claims if a taking had occurred. The ICC adopted this approach in *Supplemental Trails Act Rules*, *supra*. NARPO prefers the approach taken by this court in *Kaiser Aetna*.⁴

⁴ The Court of Claims should be a forum for the consideration of claims against the U.S. that arise from actions the U.S. did not recognize in advance would result in later claims (takings). The Constitutional integrity of the Fifth Amendment would be substantially diminished if Congress could exercise the power of eminent domain by simply confiscating property, without due process, leaving the property owner with the burden of later bringing a claim in the Court of Claims. Under this rationale no government agency would ever have to

(Continued on following page)

II

A 16 U.S.C. 1247(d) TRAIL USE AGREEMENT WHICH RESULTS IN THE CHANGE OF USE OF A RAILROAD RIGHT-OF-WAY FROM RAILROAD TO TRAIL USE AND WHICH INDEFINITELY POSTPONES PROPERTY RIGHTS WHICH WOULD OTHERWISE VEST UPON CESSATION OF RAILROAD OPERATIONS WORKS A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT

The meaning of the term "property" in the U.S. Constitution should be "broadly interpreted and addressed to every sort of interest a citizen may possess." *U.S. v. General Motors*, 323 U.S. 373, 378 (1945). What constitutes "property" in a particular circumstance is the subject of state law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

Most state jurisdictions hold that if a railroad has an easement in a right-of-way for railroad purposes only, the easement is extinguished upon abandonment of railroad operations. See *National Wildlife Federation v. ICC*, *supra* and the cases cited therein at 703. Also see *Abandonment by Railroad — Title To Land*, 136 A.L.R. 286.

(Continued from previous page)

"bother" with a condemnation action since property could simply be non-judicially appropriated. However absurd this proposition may seem, it has to date received the blessing of both the ICC and the Court in *Glosemeyer* insofar as 1247(d) is concerned. The constitutionally acceptable analysis of the condemnation/Court of Claims alternatives as they apply to 1247(d) would be that the Court of Claims may be the best remedy for those property owners affected prior to the existence of clear legal authority on whether 1247(d) may effect a taking, but that after such authority exists the power of eminent domain must be exercised.

The law is also well settled that federally granted railroad rights-of-way are either limited fees that revert or easements which are extinguished upon abandonment of railroad operations. See *State of Wyoming v. Andrus*, 602 F.2d 1379 (10th Cir. 1979) (holding that pre-1871 federal right-of-way grants are "limited fees" with an implied reverter in the event of abandonment of railroad operations) and *Great Northern Ry. Co. v. U.S.*, 315 U.S. 262 (1942) (holding that railroad rights-of-way arising out of the General Railway Right-of-Way Act of 1875 are easements which are extinguished upon abandonment of railroad operations).

The conclusion is inescapable that both state and federal law have long recognized the property rights of fee or reversionary owners in railroad rights-of-way which vest upon abandonment of railroad operations. The question which is then presented to this court is: If Congress passes legislation which alters these property rights by indefinitely postponing the vesting which would otherwise occur, does such action constitute a "taking" under the Fifth Amendment?

The Supreme Court of the State of Washington was recently presented with a remarkably similar question when the constitutionality of a state statute that permitted the conversion of railroad rights-of-way to trails in derogation of recognized property rights was challenged. The state argued that no taking could occur because application of the statute did not extinguish but simply "postponed" the vesting. The court responded to this contention as follows:

Defendants' second contention is somewhat startling. The argument that the statutes are valid because they do not "eliminate" plaintiff's reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically

obtain possession of the easements upon railroad abandonment. Under the statutes, they would not.

Lawson v. State of Washington, 107 Wn.2d 444, 730 P.2d 1308, 1313 (1986).⁵ In responding to the same argument in *National Wildlife Federation v. ICC*, *supra*, the court made the following comment at 704:

. . . We notice that the Commission cites no authority for the proposition that government action that precludes the vesting of a reversionary interest does not constitute a taking of property.

The court continued at 705:

. . . nor does the Commission offer support for its suggestion that the reversionary interests are not taken merely because they are postponed indefinitely rather than terminated outright. This proposition is similarly problematic; as the Supreme Court recently reminded, "Nothing in the just compensation clause suggests that 'takings' must be permanent and irrevocable." *First Lutheran Church of Glendale v. County of Los Angeles*, 107 S.Ct. 2378, 2388 (1987) (quoting *San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting)).

The *National Wildlife Federation* court cited a number of authorities at 704-705 to support the conclusion that postponing or precluding the vesting of a reversionary interest constitutes a taking

. . . particularly when the event that will trigger the reversion of the interest is imminent at the time of appropriation. *Lawson v. State of Washington*, *supra*, at 1315-16; 2 J. Sackman, *Nichols on Eminent Domain* §5.05[1] (Rev. 3d.Ed. 1985) (and cases cited therein), L. Simes, *Law of Future Interests* 118-19 (2d.Ed. 1966); L. Simes and A. Smith, *The Law of Future Interests* §136 (2d.Ed. 1956); 1 Restatement of Law of Property §53 comment C (1936) . . .

⁵ The Washington State Constitution has a "takings" provision essentially identical to that of the Fifth Amendment. See Art. I, §16, Amend. 9.

The court below dismissed the legal reasoning in *Lawson v. State of Washington* and *National Wildlife Federation v. ICC* by simply stating "We disagree". *Preseault v. ICC*, at 151. The court attempted to justify this "disagreement" on the theory that the ICC has exclusive authority to authorize abandonments and if the ICC determines that abandonment is not appropriate, no reversionary interests can vest. This comment seems to have been based upon the incorrect assumption that 1247(d) is imposed only if the ICC has made a determination that abandonment is not appropriate.⁶

⁶ This assumption is incorrect for reasons which include the following:

(a). Rail banking is instigated by an interested trail user — not the ICC. 49 CFR 1152.29(a).

(b). It is the carrier that makes the final decision whether or not a CITU should be issued — not the ICC. See *Washington State Department of Game v. Interstate Commerce Commission*, 829 F.2d 877 (9th Cir. 1987) and *National Wildlife Federation v. Interstate Commerce Commission*, *supra*. (Both cases held that 1247(d) could not be imposed without the consent of the railroad.)

(c). The ICC in issuing a CITU *has made* a determination that a line is appropriate for abandonment. In fact, a CITU will automatically convert into a Certificate of Abandonment if an interim trail use agreement is not negotiated within 180 days after issuance of the CITU. 49 CFR 1152.29(c)(1). Also see *Iowa Southern Railway Company — Exemption — Abandonment in Pottawattamie, Mills, Fremont, and Page Counties, Iowa*, ICC Docket No. AB-298 (Sub-No. 1X) (April 17, 1989), slip op. at 8-9: ("Iowa Abandonment"):

Indeed, the Trails Act is not implicated unless and until we have already made the determination that public convenience and necessity permit abandonment . . .

(d). If a group using a right-of-way for interim trail use elects to discontinue that use it simply has to notify the ICC that it intends to vacate the right-of-way on a specified date and on that date the railroad will be entitled to an abandonment. 49 CFR 1152.29(c)(2).

(e). CITU is the acronym for Certificate of Interim Trail Use or Abandonment. See 49 CFR 1152.29(c)(1).

Perhaps the court below was unaware that if the ICC had determined that abandonment was not appropriate no CITU would have issued since the railroad would have been obligated to continue operating over the line. See generally 49 U.S.C. 10903 et seq. and *Hayfield Northern R. v. Chicago N.W. Transp.*, *supra*. Therefore, the issuance of a CITU is an *affirmative declaration* from the ICC that abandonment is appropriate, that railroad operations may cease, that the railroad may "discontinue service, cancel tariffs, and salvage track . . .", that trail use can take its place, and that abandonment will be authorized if the railroad is unable to reach an agreement with the potential trail user within 180 days after issuance of the CITU. CFR 1152.29(c)(1).

Congress, the ICC and the court below all seem to believe that no matter what the status of railroad operations over a line may be, until the ICC issues a "Certificate of Abandonment" property rights can be indefinitely postponed without triggering any Fifth Amendment obligation to pay compensation. This legal position exhibits a misunderstanding of the rights of the petitioners and other similarly situated property owners.

It is the cessation of railroad operations and/or the change in use of the right-of-way that causes the easement to be extinguished or triggers the reversion. See *Schnabel v. County of DuPage*, 101 Ill. App.3rd 533, 428 N.E.2d 671 (1981) and the discussion therein at 675-677. Although the issuance of a Certificate of Abandonment may be as close to perfect evidence as a property owner could desire for proving that railroad operations have in fact ceased, the court below has misconstrued applicable law if it maintains that nothing less than the issuance of such a certificate will extinguish the easement or trigger the reversion.

The distinction between a Certificate of Abandonment and cessation of railroad operations may not have been important prior to the enactment of 1247(d) since most railroads are regulated by the ICC and with minor exceptions cannot cease operations without the issuance of such a certificate. However, the rules of the game have changed with the enactment of 1247(d). Cessation of railroad operations is no longer necessarily associated with the issuance of a Certificate of Abandonment since an indefinite cessation of operations is permitted and a change in the use of the right-of-way is allowed with the blessing of the ICC when it issues a CITU.

In view of the fact that the issuance of a CITU (a) is only made after a railroad petitions for and proves that it is entitled to an abandonment, and (b) results in the cessation of railroad operations and a change in use of the right-of-way, this court should hold that the issuance of a CITU (or NITU) is an event which evidences an abandonment of railroad operations within the meaning of applicable state and federal property law.

Once railroad operations terminate, the fee or revisionary owner's right to possession becomes exclusive since the railroads possessory rights are extinguished. Imposition of trail use under 1247(d) would deprive the property owner of the "right to exclude" since individuals would have the right to traverse the property. *Nollan v. Calif. Coastal Commission*, 107 S.Ct. 3141 (1987). The "right to exclude" is a fundamental property right "that the government cannot take without compensation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). This type of physical occupation of the property is compensable "without regard to whether the action achieves an important public benefit or has only

minimal economic impact on the owner." *Nollan* at 686, citing *Loretto*.

In conclusion the court below has avoided the real issue by focusing on the power of Congress and the ICC to regulate rather than on the issue of whether the regulation amounts to a taking. NARPO agrees with the D.C. Circuit in *National Wildlife Federation v. ICC* that 1247(d) can effect an unconstitutional taking.⁷

III

THE REMEDY OF A PROPERTY OWNER WITH A TAKING CLAIM ARISING OUT OF THE APPLICATION OF 16 U.S.C. 1247(d) SHOULD NOT BE LIMITED TO A CLAIM AGAINST THE U.S. UNDER THE TUCKER ACT, BUT SHOULD ALSO INCLUDE THE RIGHT TO BRING A CLAIM AGAINST THE RAILROAD AND OTHER PARTICIPANTS IN A 1247(d) TRAIL USE AGREEMENT SINCE THOSE PARTIES, ACTING UNDER COLOR OF FEDERAL LAW, PARTICIPATED IN A FIFTH AMENDMENT TAKING

In footnote 4, *infra*, NARPO presented arguments in support of its contention that once the law is settled that a "taking" may result from imposition of a 1247(d) Trail Use Agreement this constitutional problem should be solved in

⁷ The ICC in promulgating "voluntary" rules to implement 1247(d) argued that a mandatory imposition of the trail use scheme on a carrier would amount to a Fifth Amendment taking. *Trails Act Rules, supra*, at 6-8. This conclusion is rather ironic when one recognizes that 1247(d) was designed to "remedy" trail conversion problems (reversions) that exist when carriers *do not* own the right-of-way. *Washington State Dept. of Game v. ICC, supra*. What happened to the Fifth Amendment rights of non-carrier owners?

advance by exercise of the power of eminent domain rather than delegating all "after the fact" liability to the U.S. through the Court of Claims. The issue *which has not been addressed* by any court is whether the actual parties participating in a Trail Use Agreement, i.e. the railroad, state and local governments and/or private groups, may also be liable for damages arising out of any "taking" which occurs. NARPO maintains that an action for damages against all participants should exist in either state and/or federal court.

The court in the case of *Bivens v. Six Unknown Fed. Narcotics Agents*, *supra*, first held that a cause of action existed against individual federal agents who allegedly conducted an unconstitutional search and seizure in violation of the Fourth Amendment. The *Bivens* holding has subsequently been applied to the First Amendment (*Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975) cert. denied 439 U.S. 983 (1978)), the Eighth Amendment (*Carlson v. Green*, 466 U.S. 14 (1980)) and the due process clause of the Fifth Amendment (*Davis v. Passman*, 442 U.S. 228 (1978)). The Ninth Circuit in the recent case of *Trotter v. Watkins*, 869 F.2d 1312 (9th Cir. 1989) "assumed without deciding" that a *Bivens* action is also available under the takings clause of the Fifth Amendment.

Application of *Bivens* to the just compensation clause of the Fifth Amendment, as well as to other amendments, is consistent with the remedial intent of *Bivens*:

Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the federal official in federal court despite the absence of any statute conferring such a right . . .

See *Carlson v. Green*, *supra* at 19.

Respondents may argue that the availability of a "taking" remedy in the Court of Claims should prevent the creation of a *Bivens* action for 1247(d) takings. This argument might find some support in *Carlson v. Green*, *supra* at 1056, where the court stated a *Bivens* action "may be defeated" (Emphasis added) if

. . . Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

NARPO must assume that the use of the word "may" instead of shall in the *Carlson* case is an indication that the availability of a *Bivens* remedy in any particular case, even if Congress has arguably provided an alternative remedy, has not progressed to the point where a determination can be made by hard and fast rules. However appealing it may be to some, the future delegation of all taking claims arising out of 1247(d) interim trail use agreements to the Court of Claims would have the effect of subjecting the U.S. to unlimited liability for the acquisition of trails by private groups, and local and state governments. Such a result would clearly be contrary to the intent of Congress under the Trails Act. The court should consider the following on this issue:

1. It was the intent of Congress in enacting 1247(d) to avoid property claims that would otherwise arise at the time of abandonment of railroad rights-of-way. See generally H. Rep. No. 98-28, 98th Cong. 1st Sess. Congress could have easily avoided the years of constitutional litigation it certainly must have expected and which has occurred with this legislation by simply providing for the condemnation of property rights. To the contrary, the legislative history of 1247(d) suggests that

Congress specifically intended to limit the future financial obligation of the U.S. for trail acquisitions to those instances where funds were specifically appropriated in advance. Section 101 of the Trail Systems Act Amendments of 1983 reads as follows:

Notwithstanding any other provision of this act authority to enter into contracts, and to make payments, under this act shall be effective only to such extent or in such amounts as are provided in advance in appropriation acts. (Emphasis added)

2. 1247(d) is essentially a vehicle that permits interested trail users, including private groups, states and local governments, to convert railroad rights-of-way to trails. See 49 CFR 1152.29(a). In view of the legislative history which indicates Congressional intent to carefully limit acquisitions to those situations where funds have been appropriated in advance, it would be ironic if the U.S. found itself the sole legal obligor for unrestricted trail acquisitions by non-federal parties that might occur under 1274(d).

3. Several circuits have agreed with the ICC's conclusion that a railroad cannot be compelled to participate in a 1247(d) interim trail agreement. See *Washington State Department of Game v. ICC*, supra, and *National Wildlife Federation v. ICC*, supra. This provides a railroad with the ability to condition its agreement to participate in such an arrangement upon the receipt of monetary consideration. The consequence of this circumstance is that Congress through 1247(d) has, perhaps unintentionally, vested in railroads the ability to sell a property right that might otherwise not have existed. It would be unreasonable to assume that Congress intended to create a property

right in favor of the railroad that would be financed by the U.S. government.

The above facts suggest that Congress never intended to have the U.S. finance trail acquisitions under 1247(d) and, therefore, the availability of a Court of Claims remedy (which would put all the liability with the U.S.) is not sufficient cause to deny affected property owners a *Bivens* claim against the other "actors."⁸

NARPO is not aware of any Supreme Court case deciding whether a *Bivens* action may be brought against a private party. However, the D.C. Circuit, and the Fifth, Sixth and Ninth Circuits have specifically held that such an action is permissible.⁹

In interpreting the guiding principles under *Bivens*, courts often reference 42 U.S.C. 1983 ("1983") which provides a cause of action for actions taken under color of state law that result in the violation of Constitutional rights. In *Butz v. Economou*, 438 U.S. 478 (1977) this court reasoned that the availability of the defense of qualified immunity to federal officials in a *Bivens* action should be no different than that enjoyed

⁸ A *Bivens* remedy would also make the "doors of justice" more accessible since the Court of Claims would be an inconvenient forum for most litigants. NARPO maintains (but does not argue in this brief) that certain state constitutional claims may also exist against Trail Use Agreement participants.

⁹ See *Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1984), amended 829 F.2d 133 (1987), *Dobyns v. E. Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982), *Yiamouyiannis v. Chemical Abstracts Serv.*, supra, and *Trotter, Inc. v. Watkins*, supra.

by state officials in a 1983 action. No just rationale exists to distinguish the scope of other rules applicable in 1983/*Bivens* actions.

... The Constitutional injuries made actionable by §1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different than those affecting federal officials.

Butz at 500.

In *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) this court held that a cause of action existed against a private individual under §1983. The natural progression of *Bivens*, as evident from the circuit court holdings cited in footnote 9 *infra*, seems to dictate that the Supreme Court should now expressly recognize the right to maintain a *Bivens* action against private parties.

A successful *Bivens* action must establish that the defendant was "acting under color of federal law." *Reuber v. United States*, *supra* at 1054. The following facts suggest that the participants in a 1247(d) Trail Use Agreement are acting "under color of federal law":

1. The parties in a Trail Use Agreement are participating in the "supposed" Congressional plan to "preserve rail corridors for future railroad use". See *Preseault v. ICC*, *supra* at 150. Without the participation of these parties no rail-banking could occur. In essence, the federal government is achieving an important public goal through its "agents" — in this case the railroad and the other Trail Use Agreement party.

2. The rules promulgated by the ICC under 49 CFR 1152.29 et seq. for the purpose of implementing 1247(d) establish that the issuance of a CITU is the product of affirmative

efforts by the railroad and interested trail user. See 49 CFR 1152.29(a) (an interested trail user might petition the ICC indicating its desire to use a right-of-way as a trail) and 49 CFR 1152.29(c) (the ICC will issue a CITU if the railroad elects to enter into an agreement with the interested trail user). There is no element of discretion on the part of the ICC.¹⁰ To the contrary, it is the trail user and railroad that decide when and where to implement federal rail banking policy. The existence (or non-existence) of "discretion" is important as was noted in *Jones v. Previt and Mauldin*, 851 F.2d 1321 (11 Cir. 1988) at 1330, n. 2 wherein it discussed the Supreme Court case of *Lugar v. Edmonson*:

... In *Lugar*, the official who authorized the Writ of Attachment was the clerk of the court, not a judge exercising independent judicial discretion. Where, as in *Lugar*, the issuance of the Writ of Attachment is a purely ministerial exercise, the private party invoking the procedure effectively steps into the shoes of the state. Such is not the case when issuance of the Writ is the result of an exercise of independent judicial discretion. (Emphasis added)

In conclusion, this court should hold that where non-federal government actors (trail agreement parties) are the designated agents to carry out public policy (rail-banking), and where the timing and location of the implementation of that policy is at their sole discretion (49 CFR 1152.29), those parties are acting under color of federal law and have subjected themselves to the potential of a *Bivens* claim.

¹⁰ The ICC stated in *lowa Abandonment*, *supra*, slip. op. at 7:

"... In short, our issuance of a NITU or CITU under the Trails Act is only a ministerial act..." (Emphasis added)

CONCLUSION

No one can deny that the construction of recreational trails generally confers a benefit on the public at large. However, the merits of trail construction is not the issue before this court. The real issue is whether, under the pretext of "commerce", Congress can force a very few to bear the burden of a public improvement which benefits many. The simple response of NARPO is that if Congress wants private property for a public purpose, it must either negotiate for its purchase or exercise the power of eminent domain.

... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut in the constitutional way of paying for the change ..."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). 1247(d) is clearly a Congressional attempt to "short cut" the Fifth Amendment.

NARPO respectfully requests that this court, in the following diminishing order of priority, grant the following relief:

1. Hold that 16 U.S.C. 1247(d) is void as an unconstitutional exercise of the Commerce Clause; or

2. Hold that 16 U.S.C. 1247(d) is an unconstitutional exercise of the Commerce Clause when (a) its application results in the taking of private property, and/or (b) the evidence suggests restoration of railroad use in the future is unlikely.

3. Hold that although 16 U.S.C. 1247(d) is a constitutional exercise of the Commerce Clause, it nevertheless requires the exercise, in advance, of the power of eminent domain when its application would result in a taking of private property.

4. Hold that although 16 U.S.C. 1247(d) is a constitutional exercise of the Commerce Clause, a claim exists against the U.S. and all other Trail Use Agreement participants if its application results in the taking of private property.

Respectfully submitted this _____ day of June, 1989.

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AMICUS CURIAE

BRIEF

No. 88-1076

FILED

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JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

J. PAUL PRESEAUT AND PATRICIA PRESEAUT,
Petitioners,
v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
AND COUNCIL OF STATE GOVERNMENTS;
JOINED BY THE AMERICAN PLANNING ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 16 U.S.C. § 1247(d), on its face or as applied by the Interstate Commerce Commission, effects an unconstitutional taking of petitioners' claimed contingent interest in a railroad right-of-way by authorizing its placement in a federal "railbank" and its interim use by the City of Burlington as a trail.

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Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
AND COUNCIL OF STATE GOVERNMENTS;
JOINED BY THE AMERICAN PLANNING ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States, and the American Planning Association, an organization of local and regional

planners and officials concerned with effective planning and orderly urban development. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments to regulate land use in the public interest.

This case challenges the national policy of rail banking, claiming it to be a taking of property without payment of just compensation in violation of the Fifth Amendment. The statute principally involved, 16 U.S.C. § 1247(d), was enacted to protect rail transportation corridors by preserving established railroad rights-of-way for future rail service and authorizing an alternative use in the interim. The statute permits a railroad to transfer voluntarily a right-of-way no longer used for railroad purposes to a State, political subdivision, or qualified private organization for supervision and management as a trail.

The central issue in this case is whether the use of a railroad right-of-way as a trail constitutes a taking of property. Petitioners, who claim a contingent interest in a railroad corridor in Burlington, Vermont, argue that the statute and its application by the Interstate Commerce Commission work a physical or regulatory taking of their property interest that is compensable under the Fifth Amendment. That contention cannot be sustained under this Court's current takings analysis. Should petitioners prevail, the effect would be to force abandonment of sections of the network of rail corridors linking the nation, thereby imperilling local, state, and federal government efforts to meet long term transportation needs while serving other public purposes, such as the establishment of recreational trails.

Petitioners' theory could also subject members of the *amici* organizations to claims for damages under the rule in *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378 (1987). Legitimizing

claims such as petitioners' would present state and local governments with a difficult choice: to enter into a rail-banking agreement to prevent abandonment of a corridor and risk liability for indemnification for the temporary taking of property, or to forgo the interim use of the property and lose the railroad corridor forever. Success by petitioners in this case would also encourage damages claims for other regulatory changes that may affect contingent property interests, even where the new use is fully consistent with the original restriction and no more intrusive on the property interest.

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.¹

STATEMENT

The 1983 Trails Act Amendments, 16 U.S.C. § 1247(d) ("the statute"), were enacted by Congress "to preserve established railroad rights-of-way for future reactivation of rail service."² The principal provision gives the Interstate Commerce Commission ("ICC"), the agency with the exclusive jurisdiction over rail transportation, authority to save railroad corridors for future

¹ The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

² Section 1247(d) provides in relevant part: "Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. § 801 *et seq.*)], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."

use by allowing for their interim use as trails pursuant to agreements with public or private parties. Congress intended the statute to "protect railroad interests by providing that the right-of-way can be maintained for future railroad use by protecting the railroad interests from any liability or responsibility in the interim period." S. Rep. No. 1, 98th Cong., 1st Sess. 10 (1983).

Petitioners Paul and Patricia Preseault, who own land abutting the Vermont Railway's right-of-way near Burlington, Vermont, claim a contingent property interest in that right-of-way. In 1981, after the Vermont Railway had discontinued service along the line and removed the railroad tracks, petitioners sued the State of Vermont, the Vermont Railway, and the City of Burlington, seeking to quiet title to the right-of-way. The trial court dismissed the suit for lack of subject matter jurisdiction, and the Vermont Supreme Court affirmed. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985). The court held that the ICC had the exclusive and plenary jurisdiction to determine whether the right-of-way had been or could be abandoned, thus triggering petitioners' alleged property interest.³ *Trustees*, 145 Vt. at 515, 496 A.2d at 154.

In June 1985, the Vermont Agency of Transportation and the Vermont Railway leased the right-of-way to the City of Burlington. The lease provided for termination on six months' notice if the property was required for railroad use. The following month, petitioners and two other abutting landowners petitioned the ICC for a determination that the Commission lacked jurisdiction over their claim, and that they possessed a reversionary interest in the right-of-way. J.A. 11-12.

While that petition was pending before the ICC, the State of Vermont and the Vermont Railway filed a rail-

³ The precise nature of the interest, if any, held by petitioners has not been determined by the Vermont Supreme Court.

banking petition, seeking permission to discontinue service along the line—including the right-of-way claimed by petitioners—and to make the properties available to the City of Burlington for use as a bicycle and pedestrian path. The ICC approved the railbanking petition, effective in February 1986. See 51 Fed. Reg. 454 (Jan. 6, 1986).

On review of the ICC's action, the Second Circuit rejected petitioners' claims that the statute violated the Commerce Clause and the Takings Clause of the Fifth Amendment. Pet. App. 8-13. The court found that the statute met the Commerce Clause's standards because it was "reasonably adapted to the end permitted by the Constitution," namely, "preserving rail corridors for future railroad use and . . . permitting public recreational use of trails." Pet. App. 9 (citation omitted).

The Second Circuit further held that the ICC's issuance of a Certificate of Interim Trail Use to a railroad that has discontinued service is not a taking because "[t]he ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest." *Id.* at 12. The court did not reach the question whether petitioners in fact had a property interest under state law. *Id.* at 12-13.

SUMMARY OF ARGUMENT

Section 1247(d) is not unconstitutional on its face. It was passed to further the important national policy of protecting rail corridors from abandonment, and in many of its applications it does not affect any property rights. Petitioners' own challenge to the constitutionality of section 1247(d) on taking grounds is not ripe, because they have not shown that they have any property interest that is affected by the statute.

Assuming that petitioners have some property interest in the right-of-way, that interest must be defined by reference not only to state law, but also to federal law and the arrangements between the parties to the original transaction. The interest acquired by the railroad through condemnation proceedings continues so long as the right-of-way is used for railroad purposes, even though the use is not exactly the same as at the time of the conveyance. Under Vermont law, railroad abandonment cannot occur without authorization from the ICC. Federal law grants the ICC exclusive and plenary authority to regulate railroad rights-of-way and their abandonment; a railroad easement can be extinguished only when the Commission issues a certificate of abandonment.

Section 1247(d) unquestionably advances railroad purposes by furthering the legitimate governmental interest in preserving currently unused rail corridors for future railroad purposes rather than permitting their abandonment. Congress enacted Section 1247(d) to serve not only this vital purpose of railbanking, but also the complementary goal of expanding the national trail system. Trail use serves not only a recreational function, but also assures, without expense to the railroad, the maintenance of the right-of-way against destruction through the erection of buildings and the like.

Whatever property interest petitioners claim in the right-of-way, that interest is subject to the authority of the ICC and cannot ripen under Vermont law or under federal law until abandonment of the right-of-way has been authorized by the Commission. Section 1247(d) is a part of the statutory framework governing the ICC's regulation of the abandonment of railroad rights-of-way.

Petitioners retain what they have had all along: a claim to a contingent interest in a railroad right-of-way that can vest only when the right-of-way is no longer used for railroad purposes.

ARGUMENT

RAILBANKING OF RIGHTS-OF-WAY DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PROPERTY.

Section 1247(d) does not, either on its face or as applied to petitioners, effect an unconstitutional taking of contingent property interests in railroad rights-of-way.

A. Section 1247(d) Is Not Unconstitutional On Its Face.

Petitioners argue that Section 1247(d) is unconstitutional on its face. Pet. App. 5; Pet. Br. 13-22. Such an argument "face[s] an uphill battle," because petitioners must show that the "mere enactment" of the statute constitutes a taking. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1247 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). That "uphill battle" must be lost because the statute furthers legitimate governmental interests and does not deny an owner the economically viable use of his property. *Agins*, 447 U.S. at 260-63.

The importance and legitimacy of the stated purpose of Section 1247(d)—to further the national policy of protecting rail corridors from abandonment—cannot seriously be questioned. Nor can the statute be said to deny all property owners the economically viable use of their property in all circumstances. For example, there is obviously no taking in the situation where a railroad owning the fee interest in its right-of-way voluntarily enters into a trail use agreement pursuant to the statute. And even if the right-of-way is an easement rather than held in fee, the burden imposed on the servient estate if the rail corridor is subject to interim use as a trail is no greater than it has been and in fact may be less. In addition, a number of state courts have found that trail use does not extinguish railroad easements under state law. See *State ex rel. Washington Wildlife*

Preservation, Inc. v. State, 329 N.W.2d 543, 546 (Minn.), cert. denied, 463 U.S. 1209 (1983); *Rieger v. Penn Central Corp.*, No. 85-CA-11, slip op. (Ct. App. Greene County, Ohio, May 21, 1985); see also *Glosemeyer v. Missouri-Kansas-Texas Railroad Co.*, 685 F. Supp. 1108, 1119 n.10 (E.D. Mo. 1988), *aff'd*, No. 88-1863, slip op. (8th Cir. July 5, 1989).

B. Because The Precise Nature Of Petitioners' Alleged Property Interest Is Uncertain, Their Claim Is Premature.

This Court has held repeatedly that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981); see also *Pennell v. City of San Jose*, 108 S.Ct. 849, 856 (1988); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1246-47 (1987). The requirement of an "actual factual setting" is nowhere more important than in taking cases, because the analysis whether a taking has occurred necessarily involves an "essentially *ad hoc*, factual inquiry." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

This case demonstrates the wisdom of the Court's unwillingness to decide taking cases in the abstract. Petitioners' challenge to the constitutionality of 16 U.S.C. § 1247(d) on taking grounds is not ripe, because they have not shown that they have any property interest that is affected by the statute. The nature of petitioners' property interest is at best uncertain. The arrangements between the predecessors of the parties do not indicate an intent to have conveyed to the Rutland-Canadian Railroad anything less than a fee interest; neither the Vermont Supreme Court, the ICC, or the court of appeals has found otherwise. The Commissioners' Awards, which effected the original transfer to the Rutland-Canadian

Railroad, recite only that the company "for the purposes of its railroad has located, entered upon and occupied lands" owned by petitioners' predecessors. Op. Cert. 7a. Each award describes the "premises hereby conveyed" and specifies the amount of damages payable to the owner. *Ibid*. The recitation that the railroad had "occupied" the land "for the purposes of its railroad" does not suggest an intent to transfer less than a fee interest or to condition the use of the property conveyed. In plain fact, there is no reference in the award to the transfer of an easement or to the reservation of a reversionary interest.⁴

The Vermont Supreme Court has characterized the effect of a railroad condemnation as the taking of a very special kind of easement, the enjoyment of which is "much the same as that of an owner in fee." *Jackson v. Rutland & B. R.R.*, 25 Vt. 150, 159 (1853); accord *Connecticut & P. Rivers R.R. v. Holton*, 32 Vt. 43, 47 (1859).⁵ Similarly, this Court has consistently recognized that a railroad right-of-way is closely akin, if not equivalent, to a fee interest.⁶ Accordingly, it is unclear

⁴ Contrary to petitioners' assertion (Pet. Br. 4 n.3), no court has decided what interest, if any, the petitioners hold. Although the Vermont Supreme Court broadly used the phrase "an easement for railroad purposes on land owned by predecessors in title to the plaintiff" (*Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 511, 496 A.2d 151, 152 (1985)), that phrase was not a part of the court's holding. Far from making a factual finding, the Vermont court was merely describing the type of property interest petitioners claimed to hold. Later, when the court itself described the interest, it referred to it as an "alleged common law right." 145 Vt. at 515, 496 A.2d at 154.

⁵ The State of Vermont, the City of Burlington, and the Vermont Railway persuasively argue that Vermont's general railroad condemnation statute authorizes a fee taking. Op. Cert. n.12.

⁶ See *Western Union Telegraph Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904) ("A railroad right-of-way is a very

that petitioners' predecessors retained any interest in the railroad right-of-way.⁷

Those uncertainties on the critical issue of the nature of petitioners' interest make the "essentially *ad hoc*, factual inquiry" required for a takings analysis (*Kaiser Aetna*, 444 U.S. at 175), especially difficult. Because petitioners have yet to demonstrate that they have a property interest that could have been injured, a ruling on the constitutionality of Section 1247(d) as applied to them is premature.

C. Petitioners' Alleged Property Interest Must Be Defined By Reference To More Than State Law.

Property rights are not defined exclusively by state law. Instead, state law is only one of a number of sources that may legitimate claims of entitlement to private property, because "'property' denotes a broad range of interests that are secured by 'existing rules or

substantial thing. It is more than a mere right of passage. It is more than an easement. . . . A railroad's right-of-way has, therefore, the substantiality of the fee") ; *Territory of New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898) ("But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted—one having the attributes of the fee, perpetuity and exclusive use and possession 'The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easements will be perpetual,'" quoting *Smith v. Hall*, 103 Iowa 95, 72 N.W. 427 (1897)) ; *Missouri, K. & T. Ry. Co. v. Roberts*, 152 U.S. 114 (1894) (grant to one of the branches of the Union Pacific Railway Company of a right-of-way 200 feet wide determined to convey the fee).

⁷ Petitioners' predecessors were no doubt compensated as if they retained no interest. "[W]hen land is taken for such purposes as a highway or a railroad (which require a permanent and substantially exclusive occupation of the surface), the distinction between the taking of the fee and of the easement has no practical application in the determination of the compensation to be assessed for the land actually taken." 4 Nichols on Eminent Domain, § 12.41 [2] (J. Sackman 3d ed. 1985).

understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Property interests are defined by the reasonable understandings and expectations of the parties, and such understandings and expectations derive from, *inter alia*, the arrangements between the parties, state law, and federal law.⁸

Petitioners' reliance on *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), as somehow suggesting that only state law defines property rights, is misplaced. Pet. Br. 13-14. In *Monsanto*, the Court explained that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Monsanto*, 467 U.S. at 1001 (citations omitted).⁹ Although state law is concededly an important factor in determining the scope of a property interest, it has never been the only relevant factor. State law must be viewed together with the substance of the arrangements between the parties and the applicable provisions of federal law to determine whether there exist the reasonable understandings and expectations entitling a property interest to protection under the Just Compensation Clause.¹⁰

⁸ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (written contract found to provide evidence of a teacher's property right in continued employment) ; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (property interest in continued receipt of welfare benefits created by federal statute). See also *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1025-26 (1986) (examining effect of federal legislation on contractual provisions).

⁹ *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), also cited by petitioners, similarly does not stand for the proposition that state law *alone* defines property interests. Like *Monsanto*, this case holds only that state law is one of the sources from which courts can draw information as to the nature of a particular property interest.

¹⁰ We use "expectations" here as a factor in defining a property interest—not, as it is more commonly used in this Court's takings

1. Arrangements between the parties.

Petitioners claim a contingent interest in land over which a railroad right-of-way was constructed pursuant to an easement taken by the railroad in condemnation proceedings in 1899. To determine the extent of the easement taken by the railroad, the appropriate indicators are the specific intentions of the original parties to the conveyance, as well as the range of normal development options permissible under new and different conditions. See, e.g., *State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 546-47 (Minn.), cert. denied, 463 U.S. 1209 (1983); *Marden v. Mallard Decoy Club, Inc.*, 278 N.E.2d 743 (Mass. 1972); 3 R. Powell, *The Law of Real Property* ¶ 415 [2] at 34-191 to 195 (P. Rohan ed. 1987). The use to which the easement is put may vary over time because the holder of the easement is not restricted to the methods of use existing at the time of the conveyance. See *Proctor v. Central Vermont Public Service Corp.*, 116 Vt. 431, 433, 77 A.2d 828, 830 (1951); *Lawson v. State*, 107 Wash. 2d 444, 450, 730 P.2d 1308, 1312 (1986); *Faus v. City of Los Angeles*, 67 Cal. 2d 350, 431 P.2d 849, 62 Cal. Rptr. 193 (1967); see also Vt. Stat. § 3746 (1894), cited in Op. Cert. 7. Thus, in determining the extent to which the arrangements between the parties (see pages 8-9, *supra*) conferred any interest or expectation upon petitioners' predecessors, the possibility that the needs and uses of the railroad would change over the period of the easement must be considered. The railroad's easement—assuming that it is no more than an easement—continues

analysis, as an aid in determining the economic impact of a regulation on "reasonable investment-backed expectations." See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1245 (1987); *Kaiser Aetna*, 444 U.S. at 175. Our concern here, however, is the factual predicate of what is the property interest at stake, i.e., what did petitioners possess in the first place, rather than the separate issue how that "property" was affected.

to exist so long as the right-of-way is used for railroad purposes.

2. State law.

Petitioners assert that state law alone governs their alleged interest, and argue that the railroad has abandoned its right-of-way, putting an end to use of the easement for railroad purposes, and thereby extinguishing the easement. Pet. Br. 14-15.¹¹ But state law does not support petitioners' claims; the Vermont Supreme Court has determined that abandonment by a railroad of its right-of-way cannot occur without express authorization from the ICC, Pet. App. 4; *Trustees of the Diocese of Vermont*, 145 Vt. at 515, 496 A.2d at 154. Thus, even under the law of Vermont, whatever interest petitioners may enjoy in the right-of-way necessarily draws content from both state and federal rules.¹²

3. Federal law.

- a. The ICC has exclusive and plenary authority to regulate railroad rights-of-way.

This Court has concluded that the authority of the ICC to regulate the abandonment of railroads is exclusive and plenary. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981). The Interstate Commerce Act gives the ICC "broad authority"

¹¹ Taken to its logical end, petitioners' fealty to state law as the exclusive source of definitions for private property interests would allow a State to eliminate all private property by defining it away in a statute that declared private property to be public. That view of the power of state law, unrestrained by any constitutional provisions is presumably as antithetical to petitioners as it is to the Constitution.

¹² Once again, petitioners' argument that state law controls proves too much. In this instance, state law gives controlling weight to the ICC's determination of what constitutes an abandonment.

(*id.* at 319) to grant, deny, or condition¹³ a certificate authorizing a railroad to abandon its right-of-way. See, e.g., 49 U.S.C. §§ 10903(a), 10906. Indeed, without an ICC certificate of abandonment, a railroad may not abandon a right-of-way. And only when the ICC's certificate of abandonment has been issued may an easement be extinguished under state law. See *Hayfield Northern R.R. Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 633 (1984); see also *National Wildlife Federation v. ICC*, 850 F.2d 694, 704 (D.C. Cir. 1988); *State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption—In Chittenden County, Vermont*, 3 I.C.C. 2d 903 (1987). In short, whatever property interest the petitioners hold in the railroad right-of-way is defined by the ICC's authority under federal law to grant or withhold a certificate authorizing the railroad to abandon its right-of-way. Included in the framework of statutes governing the ICC's authority to regulate the abandonment of railroad rights-of-way is Section 1247(d), which directs the ICC to carry out railbanking through the encouragement of interim trail use.

b. The statute fosters a railroad purpose.

Section 1247(d) unquestionably advances the important governmental interest in maintaining the nation's rail system.¹⁴ The statute was enacted because of congressional "concern over railroad abandonments and their conse-

¹³ 49 U.S.C. § 10906 authorizes the ICC to condition the terms of abandonments. The ICC has long permitted a railroad to adopt an intermediate position between current use and abandonment. "Discontinuance authority, like railbanking, allows a railroad to cease operating a line for an indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future." 54 Fed. Reg. 8011-12 (Feb. 24, 1989).

¹⁴ The statute was enacted for purposes "[c]onsistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. § 801 *et seq.*)]. See *supra*, n.2.

quent effect on the interstate rail network." See *Glosemeyer v. Missouri-Kansas-Texas Railroad Co.*, 685 F. Supp. 1108, 1115 (E.D. Mo. 1988), *aff'd*, No. 88-1863, slip op. (8th Cir. July 5, 1989). In a report prepared pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"),¹⁵ the Secretary of Transportation had explained that in the seven years preceding the Report, "rail carriers had either abandoned or had pending applications to abandon 21,000 miles of railroad track in the continental United States, and that "the American Association of Railroads estimated that the nation's 200,000 miles of track would be reduced by a further 20% over the next decade." ¹⁶ The 4-R Act had directed the Secretary to evaluate "the advantages o. establishing a railbank consisting of selected [abandoned railroad] rights-of-way" and to discuss "interim uses of such rights-of-way." 90 Stat. 144, 145. Efforts to establish such a railbank, however, were often thwarted because, under the laws of some States, once a railroad right-of-way was abandoned and no longer subject to the ICC's jurisdiction, it reverted to the abutting landowners. Accordingly, Section 1247(d) represented Congress' attempt to "preserve the status of a right-of-way as a line of railroad in order that it may remain intact for future railroad purposes by providing for interim trail use before abandonment occurs." *Glosemeyer*, 685 F. Supp. at 1117 (quoting *Baltimore & Ohio Railroad Co.—Exemption—Abandonment in Richland County, Ohio*, I.C.C. No. AB-19 (Sub. No. 121 x) (served March 18, 1989)).

The statute expressly states its purpose to be the furtherance of "the national policy to preserve established railroad rights-of-way for future reactivation of rail

¹⁵ Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801 *et seq.*).

¹⁶ United States Department of Transportation, *Availability and Use of Abandoned Railroad Rights-of-Way* (1977), quoted in *Glosemeyer*, 685 F. Supp. at 1115.

service, to protect rail transportation use," in short, to promote "railbanking." The legislative history of Section 1247(d) confirms this statutory goal. See H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), *reprinted in* 1983 *U.S. Code Cong. & Ad. News* 119-20. The House Report announces as its "key finding" that "interim use of a railroad right-of-way for trail use" is appropriate "when the route itself remains intact for future railroad purposes." *Id.* at 119. Describing congressional efforts to encourage trail use of railroad rights-of-way "which are not *immediately necessary for active service*," the legislative history records Congress's intention to "protect railroad interests by providing that the right-of-way can be maintained for future railroad use *even though service is discontinued and tracks removed*, and by protecting the railroad interests from any liability or responsibility in the interim period." *Id.* at 120 (emphasis added). Thus, Congress decided that, in certain cases, railroad rights-of-way not currently in use might nonetheless be needed for future rail service. Railbanking prevents their destruction or alteration by, for example, development that would make future reactivation of rail service impossible.

At the same time, Congress had a complementary goal: the expansion of a national trail system. Congress, therefore, decided that so long as railroad rights-of-way were not currently in use, they could be utilized for a purpose—trails—that did not interfere with the statute's railbanking objective but rather furthered it. As the court of appeals noted, enactment of Section 1247(d) "seems a remarkably efficient and sensible way" to achieve both the primary goal of preserving existing rail corridors for future railroad needs and the complementary goal of permitting public recreational use of trails. Pet. App 9-10.

Section 1247(d) allows trail use only if "such interim use is subject to restoration or reconstruction for railroad purposes," leaving no doubt that the goal of preserv-

ing rail corridors is the dominant purpose. Moreover, the trail managers must preserve the railroad rights-of-way by assuming "full responsibility for management of such rights-of-way and for any legal liability arising out of such . . . use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way." 16 U.S.C. 1247(d).¹⁷

Application of Section 1247(d) does not alter the "existing rules and understandings" that define petitioners' alleged contingent interest in the railroad right-of-way so as to constitute a taking. Because the right-of-way continues to be used for a railroad purpose, the right-of-way remains subject to the ICC's exclusive and plenary jurisdiction.¹⁸ As the court of appeals correctly held:

For as long as it determines that the land will serve a "railroad purpose," the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle Congress' creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country. Pet. App. 12-13.

c. Section 1247(d)'s railbanking purpose is not a "sham" or "pretext".

Because Section 1247(d)'s railbanking purpose is expressly stated in the statute and confirmed by the legis-

¹⁷ In this case, the lease agreement among the State of Vermont Agency of Transportation, the Vermont Railway, and the City of Burlington provides that all such obligations shall be borne by the trail user. The lease also contains an explicit acknowledgment that the right-of-way may in the future be used for railroad purposes and grants the lessor and the railroad the right to terminate the lease on six months' notice. J.A. 11-12.

¹⁸ See *St. Louis-San Francisco Ry. Co. v. Dillard*, 43 S.W.2d 1034, 1037 (Mo. 1931) (holding railbanking is a "railroad purpose"); accord *Hennick v. Kansas City Southern Ry. Co.*, 269 S.W.2d 653 (Mo. 1955).

lative history, petitioners are reduced to asserting that the railbanking purpose expressed in the statute is a "pretext" and a "sham." Pet. Br. 12. That assertion is without substance. This Court has repeatedly held that "a court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *United States v. Darby*, 312 U.S. 100, 115 (1941). Instead, once Congress expresses its purposes, this Court has commanded that it is not the province of the judiciary to look behind such express statements to find ulterior or conflicting motives. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("[W]e reiterate that it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).

The court below, like the other courts to examine the question, firmly rejected the argument that the statute exceeds Congress's powers under the Commerce Clause. Pet. App. 8-10; see also *Glosemeyer v. Missouri-Kansas-Texas Railroad Co.*, 685 F. Supp. 1108, 112-18 (E.D. Mo. 1988), *aff'd*, No. 88-1863, slip op. (8th Cir. July 5, 1989); *National Wildlife Federation v. ICC*, 850 F.2d 694, 705 (D.C. Cir. 1988).¹⁹

During the current period of energy concerns and renewed appreciation of rail mass transportation, Congress's conclusion that some—or even all—existing railroad rights-of-way might be needed for future rail use could have justified a statute far broader than Section 1247(d). Because a railroad may be barred lawfully

¹⁹ As the D.C. Circuit observed, "there is at least some experience showing that a railroad that enters into an agreement for interim trail use may in fact intend to resume service in the foreseeable

from abandoning a right-of-way, especially when "the costs of continued operation are lifted from the carrier," *Hayfield Northern*, 467 U.S. at 636, Congress could have provided that such rights-of-way should be maintained even without trail use. That one of the considerations in the congressional decision to enact Section 1247(d) was the present, as opposed to future, utility of the line does not diminish the railroad purpose being served.²⁰ It is a happy instance of congressional "creative effort" and "foresight." Pet. App. 13.

Misguided, too, is petitioners' argument that the statutory framework regulating rail abandonments somehow conflicts with the railbanking rationale. Pet. Br. 39-43. To be sure, 49 U.S.C. § 10903 authorizes a rail carrier to abandon or discontinue its railroad line "only if the Commission finds that the present or future public con-

future. The court "therefore decline[d] to find that railbanking is necessarily a 'fiction'". *National Wildlife*, 850 F.2d at 707. The court of appeals referred specifically to *Chicago & North Western Transp. Co.—Abandonment Exemption—Guthrie and Dallas Counties, Iowa*, I.C.C. No. AB-1 (Sub. No. 192) (served May 20, 1987), where "the Commission authorized interim trail use on a right-of-way that was adjacent to the site of a proposed coal-fired power station, reasonably projecting that if the power station were built, rail service would be reactivated in order to haul coal." *Ibid*.

²⁰ State court decisions concluding that the use of railroad rights-of-way for trails constitutes a taking of reversionary property interests are distinguishable, first, because they were not decided under section 1247(d), but under state statutes or common law—see *Lawson*, 730 P.2d at 1312 (RCW 64.04.180 and RCW 64.04.190); *Schnabel v. County of Dupage*, 101 Ill. App. 553, 428 N.E.2d 671, 673 (1981) (Ill. Rev. Stat. 1979, ch. 111½ § 27); *McKinley v. Waterloo R.R. Co.*, 368 N.W.2d 131, 133-35 (Iowa 1985) (Iowa Code §§ 473.2 and 614.24 (1975), noting that 49 U.S.C. § 10906 did not "purport[] to transform that [easement] of the railroad into a greater interest"); *Pollnow v. Dept. of Natural Resources*, 88 Wisc.2d 350, 366-67, 276 N.W.2d 738 (1979) (construing common law)—and, second, because they arose after ICC certificates of abandonment had been issued (see *Pollnow*, 276 N.W.2d at 740; *McKinley*, 368 N.W.2d at 133) or at least applied for (see *Lawson*, 730 P.2d at 1310).

venience and necessity require or permit the abandonment or discontinuance." Petitioners then reason that no railroad purpose is served by railbanking because "an ICC finding of no future need must be made before trail use is ever considered." Pet. Br. 41 (emphasis omitted). But petitioners' argument improperly assumes that the "future public convenience and necessity" standard must be imported into the decision to railbank. Neither logic nor the statute requires such a conclusion. Congress was surely entitled to adopt one threshold for present abandonment ("no present or future public convenience or necessity") but nonetheless encourage railbanking as a hedge against changing circumstances or erroneous judgments.²¹ This Court should interpret 16 U.S.C. § 1247(d) and 49 U.S.C. § 10903 in such a way as to harmonize them. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984).

Petitioners urge, however, that a higher degree of scrutiny is called for, under this Court's decision in *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987), because the "railbanking" purpose of the statute is a "vapid rationalization." Pet. Br. 39. *Nollan*, however, is clearly distinguishable. It involved, as this case does not, an invasion of physical property. The State demanded, as a condition of a building permit, an easement of public passage along the Nollans' beach property—in the words of the Court, "a 'permanent physical occupation.'" 107 S.Ct. at 3145. By contrast, the trail use of the railroad right-of-way in this case affects, at most, an unvested property interest of petitioners that is

²¹ The ICC has long regulated property interests in rail corridors to serve and advance interstate commerce. For example, the ICC has the authority under 49 U.S.C. 10906 to condition the terms of abandonments to encourage continued nonrail public use. The ICC must find "whether the rail properties . . . are suitable for use for public purposes, including highways, mass transportation, conservation, energy production or transmission, or recreation." *Id.*

contingent on the extinguishment of the railroad's easement (itself acquired by eminent domain) by abandonment of the railroad right-of-way, a contingency that has not occurred.

Nollan, moreover, was not concerned with a general regulatory provision, but with a permit condition. The Court acknowledged the State's power to require a permit for development and to make the permit subject to any condition that was closely related to the initial restriction on construction. In the *Nollan* case itself, the Court found "the lack of nexus between the condition and the original purpose of the building restriction" made the condition in effect a taking rather than a valid regulation of land use. 107 S.Ct. at 3148.

Finally, *Nollan* did not purport to define any standard or level of scrutiny for governmental action that is claimed to invade property interests. The Court simply concluded that the action under review did "not meet even the most untailored standards." *Ibid.*

D. The Petitioners' Alleged Property Interest Was Not Taken.

Reference to the three sources of property rights discussed above discloses that petitioners have, at most, some form of contingent property interest that may vest only if the right-of-way is no longer used for railroad purposes. Should the railroad right-of-way be abandoned, the easement—if it is an easement, and not a fee interest—would be extinguished and the property would vest in the petitioners. The likelihood of such extinguishment, however, is not, and cannot be, rigidly static: expectations are necessarily modified by the knowledge that laws and conditions change over time.²² *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1025 (1986)

²² Cf. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Mugler v. Kansas*, 123 U.S. 623 (1887).

("[O]ur cases are now clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)).²³ Thus, what was the law of abandonment at the time the easement was taken is but the beginning of the inquiry, because what constitutes or justifies an abandonment can change.

Petitioners' claimed property interest in the right-of-way cannot ripen until the railroad right-of-way has been "abandoned." Whether the reference is to Vermont state law or federal law, abandonment is subject to the ICC's authority to grant a certificate of abandonment. Section 1247(d) declares that a right-of-way shall not be deemed abandoned if it is being used for purposes "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy-efficient transportation use," as well as for interim trail use.

A private landowner who grants (or has condemned) a railroad right-of-way submits his or her contingent interests to state and federal public highway and railroad regulatory ("common carrier") regulation. That interest is granted with the presumptive knowledge that a rail corridor is a "public highway" and that a rail carrier is subject to extensive state and federal regulation. See *Louisville & Nashville Railroad Co. v. Mottley*,

²³ See *United States v. Locke*, 471 U.S. 84, 104 (1985) ("Even with respect to vested property rights, a legislature generally has the power to impose new regulatory restraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Louisville & N.R.R. Co. v. Mottley*, 219 U.S. 467, 482 (1911).

219 U.S. 467, 481-82 (1911), quoting *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1907) (rejecting taking claim). Such regulation can and does require exclusive public use of the surface estate, and can and does result in indefinite postponement of reversionary interests, but it has never been considered a "taking" that violates the Fifth Amendment. A landowner simply has no reasonable investment-backed claim to a "public highway" so long as it is used and regulated as such.

By recognizing the railroad purpose of railbanking, Congress has not redefined the word "abandonment" to mean something completely different—transforming property rights by *ipse dixit*. See *Monsanto*, 467 U.S. at 1012. To the extent that including the railbanking concept may have modified existing rules regarding abandonment, Congress did no more than take the measured steps which can reasonably be taken to address new public conditions. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

In this case, petitioners retain whatever claim they have had all along: a contingent interest in a railroad right-of-way which cannot vest until the right-of-way is no longer used for railroad purposes. The operation of the railbanking program may have changed the probability that the claimed interest will vest, but not beyond the bounds of petitioners' reasonable expectations.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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BRIEF

(15)
No. 88-1076

Supreme Court, U.S.

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COUNTY CONSERVATION BOARDS,
NATIONAL WILDLIFE FEDERATION,
NATIONAL AUDUBON SOCIETY
AND NATURAL RESOURCES DEFENSE COUNCIL
IN SUPPORT OF
RESPONDENTS STATE OF VERMONT, ET AL., AND
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IN THE
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IN SUPPORT OF
RESPONDENTS STATE OF VERMONT, ET AL., AND
INTERSTATE COMMERCE COMMISSION, ET AL.

In its decision below, the United States Court of Appeals for the Second Circuit reaffirmed Congress' power under the Commerce Clause, as exercised through the Interstate Commerce Commission (ICC), to regulate rail abandonments so as to preserve rail facilities for future as well as current use, and to do so in an environmentally sensible manner under section 8(d) of the National Trails System Act ("Trails Act"), 16 U.S.C. 1247(d). *Pres-*

Seault v. ICC, 853 F.2d 145 (2d Cir. 1988). Petitioners Mr. & Mrs. Preseault ("petitioners") in this proceeding ask this Court to reject the Second Circuit's view.

The petitioners offer two basic theories to this end: First, relying on *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141 (1987), petitioners argue in effect that congressional power to regulate under the Commerce Clause must now be substantially curtailed, with the result here that Congress lacks power to preserve rail corridors. Second, citing cases like *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987), petitioners assert that foresighted regulation of railroad corridors to preserve them for future use in an environmentally prudent manner constitutes a taking violative of the Just Compensation Clause of the Fifth Amendment. Neither of petitioners' theories withstand analysis.

INTEREST OF AMICI

Amicus Iowa Association of County Conservation Boards is an association representing the county conservation boards of all 99 counties in Iowa.* In Iowa, the county conservation boards are agencies of local government which manage conservation projects within their respective jurisdictions. The four individually-named amici Boards manage, or seek to manage, railroad rights-of-way pursuant to section 8(d) of the Trails Act. The Carroll and Sac County Conservation Boards negotiated the first successful interim trail use and railbanking agreement under section 8(d).¹ That agreement covers approximately ten miles of a 30-mile rail line, the remainder of which was transferred to another carrier for continued current rail service. The Page County Conser-

* The parties' letters of consent, pursuant to Sup. Ct. Rule 36, have been filed with the Clerk.

¹ See *Chicago & North Western Transp. Co.—Exemption—Maple River and Ida Grove, Iowa*, AB-1 (Sub-no. 191X), served August 21, 1986.

vation Board is involved in a 60-mile railbanking project recently approved by ICC for an Iowa Southern right-of-way running from Council Bluffs diagonally to the Missouri state line.² The Guthrie and Dallas County Conservation Boards manage a 33-mile right-of-way retained under section 8(d) by an electric utility cooperative for future rail use to serve a prospective coal-fired generating facility outside Des Moines.³ Many other Iowa county conservation boards, all members of the Association, are active in managing rail corridors pursuant to section 8(d). The Association, its members, and the four individually joining Boards are interested in cooperating to preserve rail corridors pending reactivation for rail service because they provide important wildlife habitat ("edge-row effect"), especially in heavily agricultural midwestern states, and also afford other conservation and recreational benefits, as well as serve railbanking goals.

Amici National Wildlife Federation (NWF), National Audubon Society (Audubon) and Natural Resources Defense Council (NRDC), are non-profit, public interest conservation organizations. NWF has approximately three million members. Audubon has approximately 550,000 members. NRDC has approximately 100,000 members and supporters. All three organizations seek to conserve and to foster wildlife habitat and to preserve natural areas.

Rail transportation is an energy-efficient, environmentally desirable form of transportation, both for freight and passenger purposes. See 45 U.S.C. § 801 (congressional finding). Where business conditions render current rail use economically infeasible, preservation of

² *Iowa Southern Railroad Co.—Exemption—Pottawattamie, et al, Counties, Iowa*, AB-298 (Sub-no. 1X), served May 18, 1989.

³ *Chicago & N.W. T. Co.—Abandonment—Guthrie and Dallas Counties, Iowa*, ICC Dkt. AB-1 (Sub-no. 192X) (unpublished, available through Lexis-Trans), served May 7, 1987.

the rail corridors for future rail use (a concept known as "railbanking") serves the important purpose of holding down the otherwise frequently impossibly high cost of reassembling a right-of-way.⁴ Railbanking thus fosters two transportation purposes with conservation overtones: energy-efficiency and environmental sensitivity. Further, NWF, Audubon and NRDC all recognize that railroad rights-of-way are ecologically significant facilities, providing valuable and in many instances irreplaceable habitat for various plant and animal species, including many that are endangered or threatened.⁵ Measures tending to preserve such corridors, such as section 8(d) of the Trails Act, thus serve an important environmental function totally apart from transportation ends.

SUMMARY OF ARGUMENT

All courts that have reviewed section 8(d) of the Trails Act have concluded that it is well within Congress' power under the Commerce Clause as traditionally conceived. Petitioners suggest that this Court impose a new, stringent test to curtail sharply congressional Commerce Clause authority whenever exercise of that power may result in a "taking." Although creatively framed, petitioners' invitation amounts to a call for the Court to return to a variant of the discredited pre-1937 doc-

⁴ "To assemble a right-of-way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights-of-way over which they have been built." *Reed v. Meserve*, 487 F.2d 646, 649 (1st Cir. 1973).

⁵ See, e.g., W. McCain (Ill. Dept. of Cons.), *Illinois Prairie: Past and Future* 10 (1986) (railroad rights-of-way and pioneer cemeteries are chief remaining locations of prairie remnants); J. White (Nature Conservancy), "Why Bother to Protect Prairies along Railroads," paper reprinted in *Proceedings of the 1984 North American Prairie Conference* 172-73 (Tri-College Univ. Center for Environmental Studies, No. Dak. State Univ., Fargo) (explaining that rail corridors "deserve priority for protection" in order to preserve prairie remnants and habitat).

trine of judicial interventionism under the guise of "substantive due process."

In any event, rational regulation, which section 8(d) clearly is, is not a taking. In fact, section 8(d) is highly rational: it preserves corridors for future rail use (i.e., serves future interstate commerce) at no cost to current rail carriers or shippers (i.e., no cost to current interstate commerce) by placing those costs on interim corridor management entities (state or local governments or qualified private organizations that voluntarily agree to maintain the corridor intact as a trail until rail service is restored).

Petitioners argue that by allegedly postponing their "reversionary"-type interests, or by fostering some allegedly "new" government "intrusion" on these interests, section 8(d) results in an unconstitutional taking. But "reversions" in railroad rights-of-way have always been subject to comprehensive federal and state "public highway" and "common carrier" regulation. This regulation, manifest at the federal level primarily through the provisions of the Interstate Commerce Act, as amended, long has had the effect of "postponing" indefinitely the maturation of "reversionary"-type interests. Indeed, that is one of its primary effects.

Section 8(d) does not materially add to the federal and state regulatory burden on petitioners' "reversionary" interests. Instead, its main effect is to shift the burden for maintaining the corridor from the railroad to a third party that steps forward voluntarily. In doing so, the statute provokes no new intrusion onto the "reversionary" interests. The corridor was a "public highway" subject to ICC jurisdiction before application of section 8(d), and remains a "public highway" subject to ICC jurisdiction post-application.

ARGUMENT

I. SECTION 8(d) COMPORTS WITH THE COMMERCE CLAUSE.

The traditional test governing the constitutionality of Congressional exercise of Commerce Clause authority is "relatively narrow":⁶ it is whether legitimate purposes are served, and whether the means selected are "reasonably adapted" to those ends.⁷ Section 8(d) has been uniformly and repeatedly upheld under this analysis. *Glosemeyer v. Missouri-Kansas-Texas Railroad*, — F.2d —, — (8th Cir. July 5, 1989) (Slip op. at 13-14); *Preseault v. ICC*, *supra*, 853 F.2d at 150; *National Wildlife Federation v. ICC*, 850 F.2d 694, 705 (D.C. Cir. 1988) ("[n]o one doubts that Congress has power" to preserve corridor even if exercised without any rail regulatory purpose); *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 685 F.Supp. 1108 (E.D. Mo. 1988).

Section 8(d) serves two legitimate purposes: preservation of corridors for future rail use (see *Reed v. Meserve*, *supra*, 487 F.2d at 649-50) and fostering recreational activities. *National Wildlife Federation v. ICC*, 750 F.2d at 705. And, as both the Second and Eighth Circuit have found, the statute "is remarkably efficient and sensible" in securing those purposes. *Glosemeyer v. M-K-T*, — F.2d at — (slip op. at 14), quoting *Preseault v. ICC*, 853 F.2d at 150.

Historically, the chief deterrent to preservation of rail corridors for future use has been the high cost associated with the railbanking period and, since the adoption of the Railroad Revitalization and Reform (4-R) Act in

⁶ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

⁷ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

1976⁸ and the subsequent Staggers Act in 1980,⁹ the reluctance to impose those costs upon the rail industry and current rail shippers. A report prepared by two University of Iowa economists for the Iowa legislature summarized the basic problem prior to the adoption of section 8(d) as follows:

"The longer the [railroad right-of-way] must be banked before being redeveloped as a railroad or as some other transport corridor, the higher will be the costs and the less the likelihood of the project having a positive net present value. At the same time, if interim uses can be identified and initiated before this redevelopment occurs, the project is more likely to have a positive net present value. The abandoned right-of-way may also provide significant soil, water and wildlife conservation benefits and that may justify the retention of right-of-way for such purposes alone."¹⁰

Section 8(d) embodies a means to preserve the corridors for future rail use not only while lifting the costs from the carriers in conformity with the deregulatory intent of the 4-R Act¹¹ and Staggers Act,¹² but also by enhancing the "positive net present value" of the railbanking project through compatible interim uses. Section 8(d)

⁸ 90 Stat. 31.

⁹ 94 Stat. 1325.

¹⁰ J. Barnard & D. Beckmann, *Feasibility of Land Banking Railroad Right-of-Way* (Legis. Env. Adv. Group, University of Iowa, January 1981), at p. 41.

¹¹ See 45 U.S.C. § 801 (basic intent). Section 802 of the 4-R Act, 90 Stat. 127-30, addressed rail abandonment.

¹² See 49 U.S.C.A. § 10101a note (purposes). Section 402 of the Staggers Act, 94 Stat. 1941-42, addressed abandonments and, among other things, added 49 U.S.C. § 10905.

is in fact "remarkably efficient and sensible" in accomplishing its railbanking purpose.¹³

Recognizing that the statute is indestructible under traditional analysis, petitioners have groped for a theory to eviscerate congressional commerce power. Petitioners contend that *Nollan v. California Coastal Commission*, *supra*, requires far stricter scrutiny of the rationale Congress offers for a statute whenever the statute regulates use or disposition of property (in the words of the petitioners, when the statute might involve a "taking").¹⁴ Petitioners further argue that under such strict scrutiny, the purposes of section 8(d) are a "sham" and the statute, they assert, is thus illegitimate.

The implications of petitioners' invitation to establish some new test of heightened scrutiny under the Commerce Clause when property is affected are wide-ranging and troubling. The buying, selling, transfer, transport, and use of property are the subject matter of commerce. Most Commerce Clause regulation accordingly affects property. Virtually all federal economic and environmental regulation would thus fall prey to petitioners' argument. Further, the Commerce Clause is one of the most significant empowering clauses that the Constitu-

¹³ It is also worth underscoring that the scope of Congress' Commerce Clause authority has consistently been broadly construed in situations involving regulation of railroads and rail property. *E.g.*, *Southern Railway v. United States*, 222 U.S. 20 (1911); *Houston, East & W. Texas Ry Co. v. United States*, 234 U.S. 342 (1914); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

¹⁴ Petitioners' effort to conjure up a theory narrowing the Commerce Clause may be simply a backdoor acknowledgement that section 8(d) is constitutional under the Just Compensation Clause of the Fifth Amendment, either because it is not a "taking" or because if it is a taking, just compensation is available under the Tucker Act, 28 U.S.C. § 1491. Because of these dual defenses, petitioners are pressed to suggest a narrowing construction of basic legislative power.

tion affords the federal government.¹⁵ Petitioners are thus angling for a curtailment of fundamental federal power that is sharp indeed. Chief Justice Marshall warned a century and a half ago against a "strict construction" of the Commerce Clause contrary to its objectives,¹⁶ explaining that a "narrow construction would cripple the government and render it unequal to the objects for which it is declared to be instituted."¹⁷

The parallel is striking between petitioners' arguments and the pre-1937 holdings (associated with *Lochner v. New York*, 198 U.S. 45 (1905)) temporarily narrowing congressional Commerce Clause power and deriving related restrictions from the Due Process Clause of the Fifth and Fourteenth Amendments. But these holdings were circumscribed and abandoned shortly after *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), because of their unmanageability and their fundamental misallocation of regulatory power to the courts.¹⁸ Since that time, our Nation if anything has grown even more complex, and the need for federal regulatory flexibility in order to achieve the objectives of the Commerce Clause

¹⁵ *See, e.g.*, The Federalist Papers, No. 56 (Madison, listing taxation and regulation of the militia as others of equal significance); *id.*, No. 42 (Madison, importance of regulating commerce between states to minimize strife and to control "the impatient avidity for immediate and immoderate gain"); No. 22 (Hamilton, noting the importance of suppressing certain forms of state regulation). *See also* *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23 (1824) ("The power over commerce . . . was one of the primary objects for which the people of America adopted their government. . .," per Marshall, C.J.).

¹⁶ These objectives encompass both the creation of a national market and the preemption of state laws impeding or rendering more onerous, now or in the future, interstate commerce.

¹⁷ *Gibbons v. Ogden, supra*.

¹⁸ *E.g.*, G. Gunther & N. Dowling, *Constitutional Law* 962 (8th ed. 1970). *See also* E. Barrett, et al., *Constitutional Law* 932-33 (1963).

is all the greater. No compelling policy has been advanced for reviving the *Lochner* doctrine under some new but similarly interventionist guise of vindicating another clause in the Fifth Amendment.

Certainly no reason is provided in *Nollan* for such a result. *Nollan* did not even involve the Commerce Clause. It involved an exercise of state police power. The Court did not rule that the state lacked police power. All it ruled was that certain exercises of that power might require compensation under the Fifth Amendment. Whether section 8(d) comports with the Fifth Amendment's Just Compensation Clause is explored below.

II. SECTION 8(d) IS CONSTITUTIONAL UNDER THE FIFTH AMENDMENT.

A. Section 8(d) Is Not a Taking.

Since petitioners' principal reliance is on *Nollan*, we will initially focus our analysis on that case. *Nollan* recognized that reasonable regulation was not a "taking," but held that the restriction at issue in that case "utterly fails to further the end advanced as the justification for the prohibition." 107 S.Ct. at 3148. The Court accordingly held that the restriction could not be characterized as reasonable regulation. In contrast, the goal of preserving rail lines for future use, embodied in section 8(d) (and in the basic federal regulatory statutes governing rail abandonments from their inception),¹⁹ and the means provided by the statute (interim trail use) are tightly interwoven.

First, section 8(d) of the Trails Act is part and parcel of a general federal regulatory regime controlling rail-

¹⁹ The current statute, even in the deregulatory era of the 4-R and Staggers Acts, authorizes ICC to consider present or future public convenience and necessity in authorizing abandonments (49 U.S.C. § 10903) and expressly provides authority for ICC to consider alternative corridor-preserving public uses in the event an abandonment is authorized. 49 U.S.C. § 10906.

road abandonments. This regime in some instances indefinitely postpones abandonments in comparison with what would otherwise occur under state law,²⁰ and in other instances expedites abandonments that would otherwise be prevented under state law.²¹ This regulation has never heretofore been viewed as occasioning a legitimate claim of "taking" either by a "reversionary" interest holder when abandonment is forestalled,²² or by a dependent rail user or shipper (i.e., someone who relies on the railroad) when rail service is severed.²³ Similarly, indefinite delay in authorizing a particular abandonment has never been viewed as a taking of a railroad's property so long as the railroad's entire operation is not thrown into loss.²⁴

We will focus on the situation where abandonment is forestalled. Under the law of some²⁵ (but by no means all²⁶) states, preservation of a corridor for future rail service is difficult if not impossible once current rail service ceases. Indeed, especially since World War I, many interest groups have actively lobbied state legis-

²⁰ See *Kansas City Area Transp. v. Ashley*, 555 S.W.2d 9 (Mo. 1977), cert. denied, 434 U.S. 1066 (1978).

²¹ See *Chicago & N.W. T. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (preemption of Iowa law impeding abandonment).

²² E.g., *Chicago & Alton R.R. Co. v. Toledo, P. & W. R.R. Co.*, 146 ICC 171 (1928); cf. *Louisville & A. R.R. v. Bickham*, 602 F. Supp. 383, 384 (M.D. La. 1985), aff'd, 775 F.2d 300 (5th Cir. 1985).

²³ See, e.g., *Louisville & N.R. Co. v. Motley*, 219 U.S. 467, 481-82 (1911).

²⁴ E.g., *Lehigh & N.E. Ry. Co. v. ICC*, 540 F.2d 71, 84 (3d Cir. 1976), cert. denied, 418 U.S. 1061 (1977).

²⁵ E.g., *Lawson v. State*, 107 Wash. 2d 444, 730 P.2d 1308 (1986).

²⁶ E.g., *State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W. 2d 543 (Minn.), cert. denied, 463 U.S. 1209 (1983).

latures or pressed state or local courts for laws and opinions to this effect. Since railroad lines are quintessential "highways" of interstate commerce,²⁷ these restrictive laws (if adopted) obviously affect such commerce and are a proper province for federal regulation. The federal government has accordingly long regulated rail abandonments, and since 1920, the authority of the federal government over such abandonments has been "exclusive" and "plenary." *E.g.*, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981). *See also Colorado v. United States*, 271 U.S. 153, 165-66 (1926) (Congress has power to assume "paramount control" over abandonments and it "may determine to what extent and in what manner" intrastate concerns must be "subordinated"). It flows from this that state laws relating to railroad abandonments and disposition of property comprising a rail line do not apply until after ICC authorizes an abandonment,²⁸ and then only to the extent that the state laws are not inconsistent with the ICC authorization.²⁹

The very essence of this federal regulation is to "postpone"—indefinitely—the current possessory enjoyment of "reversionary"-type interests. This happens whenever ICC refuses to authorize an abandonment, or authorizes only a "discontinuance" as opposed to an abandonment, or requires a carrier that wishes to cease service to transfer a line to a government agency or another

²⁷ *E.g.*, *Southern Railway v. United States*, *supra*, 222 U.S. at 25 (railroad is a "highway of interstate commerce"); *Schechter Poultry Corp. v. United States*, *supra*, 295 U.S. at 546 (railroads are "highways of both interstate and intrastate commerce").

²⁸ *E.g.*, *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151, 154 (1985); *Kansas City Area Transp. v. Ashley*, *supra*.

²⁹ Compare *Chicago & N. W. T. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) with *Hayfield Northern R. Co. v. Chicago & N.W. T. Co.*, 467 U.S. 622 (1984).

carrier which requests an opportunity to continue to provide service.

"Railbanking"—preserving corridors for future rail use—was previously accomplished by authorizing a "discontinuance" rather than an "abandonment." *See* 54 Fed. Reg. 8011 (ICC notes similarity between discontinuances and section 8(d) railbanking). A discontinuance permitted the railroad to cease service, but required the carrier to retain the corridor intact and subject to ICC jurisdiction. The chief drawback was the carrier was subject to on-going responsibility for taxes, torts, and management of the corridor.

In response to the economic crisis then affecting the rail industry, Congress adopted legislation affording increased flexibility to carriers in the area of rates and abandonments. However, Congress was nevertheless concerned that corridors be preserved where possible for current or future use, if that could be done without significant cost to the rail industry and current rail shippers. This concern is reflected in what is now 49 U.S.C. § 10905 for purposes of current rail use, and in statutes like section 8(d) of the Trails Act with respect to future use.³⁰

Section 8(d) of the Trails Act preserves rail lines for future use while at the same time relieving the rail industry of the costs of maintaining currently uneconomic corridors.³¹ Just as 49 U.S.C. § 10905 provides a means

³⁰ Congress expressed its concern to preserve rights-of-way for future use in the 4-R Act, where it adopted provisions to subsidize purchase of lines, *inter alia*, "for future rail service. . . ." 90 Stat. 130, § 803. Congress also authorized a study of abandoned lines, including the feasibility of a railbank and interim uses. 90 Stat. 144-45, § 809(a). This concern resulted, among other things, in section 8(d) of the Trails Act, 16 U.S.C. § 1247(d), combining railbanking and interim use.

³¹ The statute requires the interim trail manager to relieve the railroad of tax, managerial and legal responsibilities associated with railbanking the right-of-way.

to assure that a corridor is kept intact for current service without burdening the carrier seeking to abandon,³² section 8 (d) provides a means to assure that a corridor is kept intact for future service without burdening the carrier seeking to abandon. Just as the one serves "current public convenience and necessity," the other serves that of the "future." Congress has power to assure both, and, as the Second Circuit ruled in *Preseault*, there is no reason to distinguish between the two, 853 F.2d at 151. Two circuits have accordingly determined that section 8(d) is a "remarkably efficient and sensible way" to accomplish legitimate regulatory goals. *Preseault, supra*, 853 F.2d at 150; *Glosemeyer*, — F.2d at — (slip op. at 14). Given so rational a connection between means and ends, petitioners' reliance on *Nollan* is simply misplaced.

The problem can be approached from another angle. It was established long ago that the power of Congress to regulate interstate commerce cannot be superseded by private agreements between parties. See, e.g., *New York v. United States*, 257 U.S. 591, 601 (1922); *Philadelphia, B. & W. R.R. Co. v. Schubert*, 224 U.S. 603, 614-15 (1912); *Louisville & N. R. Co. v. Mottley*, 219 U.S. 467, 481-82 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230 (1899). As a corollary, a railroad's private arrangements cannot abrogate federal rail regulatory authority. *Moeller v. Interstate Commerce Commission*, 201 F. Supp. 583, 589-90 (S.D. Iowa 1962) (three-judge); *North Carolina v. United States*, 210 F. Supp. 675, 679 (M.D. No. Car. 1962) (three-judge).

This point is illustrated in a number of early ICC cases. For example, in *Chicago & Alton R.R. Co. v.*

³² Under 49 U.S.C. § 10905, a state or local government or private party must agree to subsidize operation of a line, or to buy the line for "salvage value." See *Chicago & N.W. Transp. Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (compulsory sale under § 10905 at salvage value for continued passenger use by local governments).

Toledo, Peoria & Western R.R. Co., 146 ICC 171 (1928), the Commission required that a certificate of abandonment be obtained prior to cessation of service even though such cessation was required under the terms of a lease. Citing a passage from *Louisville & N. R. Co.*, *supra*, 219 U.S. at 482, the Commission rejected the contention that the parties' lease was binding for regulatory purposes. The Commission emphasized that if its jurisdiction over abandonments and discontinuances of service was to be limited or circumscribed by the specific provisions of private contracts, and was to be exercisable only during the life of those contracts, then the Commission's jurisdiction "could be entirely defeated by short-term contracts made renewable at the option of the parties."

Railroad rights-of-way have long been subject to first state and then federal common carrier and public highway regulation. This regulation applies not simply to rail operations but also to "physical properties and interests." *Matter of Boston & Maine Corp.*, 596 F.2d 2, 5-6 (1st Cir. 1979). Any person accepting a "reversion" in a parcel in a rail corridor is implicitly accepting the burdens imposed by federal (or, to the extent not preempted, state) highway and common carrier regulation. One of the objects of this regulation is to postpone indefinitely abandonment and reversion of the corridors when the public interest is advanced thereby. Holders of "reversionary"-type interests have no reasonable, investment-backed expectation in current possessory interest in regulated railroad rights-of-way.

Petitioners claim that the rail regulatory nexus is a "sham," evidently implying that even if they had no investment-backed expectation of current possession for rail regulatory purposes, section 8(d) lacks a legitimate rail purpose. But Congress identified a rail regulatory purpose in the first sentence of the statute, and in any event petitioners' claim of "sham" is demonstrably miscast. The 33-mile rail corridor managed by amici Dallas and

Guthrie County Conservation Boards is owned by CIECO, an electric utility cooperative, which obtained it from the abandoning rail carrier under section 8(d). CIECO transferred interim trail rights (through Iowa Trails Council) to the two Boards for the purpose of preserving the right-of-way for restoration of rail service sometime after the turn of the century in order to serve a potential electric generating facility for which CIECO already owns a site on the line.³³

Although Judge Ginsburg in *National Wildlife Federation v. ICC*, *supra*, accordingly recognized that "railbanking" was thus *not* a "sham" in his decision (to which petitioners of course advert) questioning whether section 8(d) might result in a taking (850 F.2d at 707), he expressed discomfort that the Commission did not make an express finding that resumption of rail service was "likely or at least possible along a particular right-of-way. . . ." *Id.* But it is inevitably difficult to predict exactly when rail service will be restored on the line being railbanked by CIECO and the Dallas and Guthrie Boards, or on any other railbanked line, or even to "prove" that it will be restored. That depends on future business conditions, future government regulation, and a host of other uncertainties. But the fact that a year and a date cannot be specified is not grounds to treat railbanking as a "sham." Many rail lines were originally built not to serve an existing business, but to attract business, or to make business feasible in the future, along the line. This fundamentally is the same reason rail lines are railbanked: to foster business opportunities and to induce business to locate along the corridor in the future. Congress recognized this fact in making a general finding for the propriety of railbanking for future use our dwindling supply of remaining railroad rights-of-way. It reaches too far to question that judg-

³³ See note 3, *supra*.

ment.³⁴ *Accord*, *Reed v. Meserve*, *supra*, 487 F.2d at 649-50 (regulation to preserve rights-of-way indefinitely for future use is appropriate).

Petitioners' reliance on physical invasion cases such as *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (Pet. Br. at 19) is misplaced. A railroad is a public highway. A shift in its form from railroad to interim trail and railbank simply retains the corridor as a public highway.³⁵ Further, an operating railroad is gen-

³⁴ Judge Ginsburg's technical analysis of railroad right-of-way interests also failed to give adequate weight to the fundamental public highway nature of a railway, and its exceptional (and long-standing) susceptibility to federal (and state) regulation. Under the law of most states, public highways are largely interchangeable, and public policy in most if not all states favors their preservation. See note 35 *infra*.

Judge Ginsburg also felt that in rail regulatory cases, "the temporary nature of the imposition upon the property rights of the carrier [and implicitly the reversionary interest holder] was essential to put it on the regulation side of the narrow line separating reasonable regulations from compensable takings." 850 F.2d at 708. But it is well-established under the Interstate Commerce Act prior to the 4-R Act and the Staggers Act that Congress through the ICC could indefinitely require a carrier to maintain service on a money-losing line so long as the carrier's entire system was not thrown into loss. This was the concept of cross-subsidization from which Congress sought to move (for policy rather than Fifth Amendment reasons), but still preserve corridors through 49 U.S.C. § 10905 and section 8(d). In any event, Judge Ginsburg's effort to distinguish away rail regulation as "temporary" will not wash after *First Evangelical Lutheran Church*, *supra*.

³⁵ See *Haeussler v. Braun*, 314 N.W.2d 4 (Minn. 1981), quoting *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 543, 63 N.W. 111, 112 (1895): "The question, then, is what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. . . . [I]t has become settled law that the easement is not limited to the particular

erally viewed as akin to a "limited access" highway, the most burdensome kind of "highway" to which a "reversion" can be subjected, since all abutter rights are generally curtailed. If anything, preservation of the corridor through interim trail use relieves the abutting landowner of restrictions on his or her rights. If a government requirement of continued rail operation is not a physical invasion, it is hard to see how the lesser "imposition" of preservation for future rail operation is one. See *Nollan, supra*, 107 S.Ct. at 3147-48. Additionally, ICC in denying a rulemaking petition by railbanking opponents found that there was no evidence of maintenance problems or other burdens associated with rail corridors preserved through trail use, and that the evidence in fact indicated no burdens.³⁶ Interim trail use under section 8(d) is thus a non-burdensome means of financing the preservation of the corridor for future rail use fully consistent with the public highway nature of the corridor.

In short, section 8(d) is reasonable regulation, not a "taking." *United States v. Locke*, 471 U.S. 84, 104 (1985); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

methods of use in vogue when the easement was acquired. . . . Another proposition . . . is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles."

³⁶ Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, Ex parte No. 274 (Sub-no. 13), served May 26, 1989, at p. 3 n.4 (citing Seattle Engineering Department study), p. 6 (no need for maintenance standards), p. 6 n.9 (no significant maintenance problems). Judge Ginsburg's reluctance in *National Wildlife Federation v. ICC*, 850 F.2d at 706 n.17, to find no increased burden due to a trail has thus been mooted by an ICC decision.

B. Just Compensation in Any Event Is Available.

Petitioners have another hurdle to surmount in their quest to invalidate section 8(d). The Constitution does not bar "takings." It only bars takings without just compensation. That compensation can be paid after the taking has occurred. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). This Court has repeatedly held that the United States through the Tucker Act has impliedly promised to pay compensation for any taking by a government agency acting within the scope of its regulatory power. E.g., *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459-60 (1985). Thus, even if section 8(d) might in some instance constitute a "taking,"³⁷ it remains constitutional.

Application of section 8(d) to regulate "reversionary"-type interests is clearly within the scope of ICC authority. Section 8(d) expressly states Congress' intent to preempt state statutory or common law treating railbanking fostered through interim trail use as an "abandonment." The statute provides on its face that interim trail use and railbanking shall not be considered an abandonment for purposes of state or local law.³⁸ The legislative history emphasizes this point.³⁹ Several circuits as well as ICC have viewed that aspect of the section 8(d) as its salient directive feature.⁴⁰

The only remaining question is whether the Tucker Act remedy has been clearly withdrawn. Nothing in the statute or its legislative history withdraws the remedy.

³⁷ For the reasons previously stated, application of section 8(d) constitutes a taking in any instance.

³⁸ 16 U.S.C. § 1247(d) (second sentence).

³⁹ E.g., H. Rep. No. 98-28, 98th Cong., 1st Sess. 8-9; 1983 U.S. Code & Cong. News 112, 119-20.

⁴⁰ E.g., *Washington State Dept. of Game v. ICC, supra*, 829 F.2d at 881.

Both are silent on the matter except for report language expressing a clear intent that section 8(d) be applied to forestall abandonments and to preserve corridors. The various "items" cited by petitioners in their brief relate to other features of the 1983 Trails Act amendments dealing with various national trails and with the Interior Department, not with railbanking and ICC. There certainly is no clear withdrawal of the Tucker Act remedy. Under *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Tucker Act must be presumed applicable. *Accord, Glosemeyer v. M-K-T*, — F.2d at — (slip op. at 18-20); *Glosemeyer v. M-K-T*, 685 F.Supp. at 1119.

CONCLUSION

Section 8(d) is, from both transportation and broad environmental perspectives, "remarkably efficient and sensible." It enables the preservation of corridors for future rail use in a fashion that not only minimizes costs to interstate commerce but also maximizes environmental benefits in the interim. The constitutionality of the statute should be conclusively affirmed, as should the determination of the Second Circuit.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

JUL 28 1989

JOSEPH F. SPANIOL, JR.

In The
Supreme Court of the United States
October Term, 1989

J. PAUL PRESEAU, et al.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF BY AMICI CURIAE STATE OF CALIFORNIA,
JOHN K. VAN DE KAMP, ATTORNEY GENERAL OF
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QUESTION PRESENTED

1. Whether 16 U.S.C. § 1247(d) is a legitimate exercise of Congress' plenary authority under the Commerce Clause.

2. Whether 16 U.S.C. § 1247(d) in establishing a "rail bank" program which preserves discontinued but not abandoned rail lines for future use by authorizing interim use of protected rail corridors as recreational trails, on its face, effects a taking of property requiring compensation under the Fifth Amendment.

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INTEREST OF AMICI STATES

Amici respectfully file this brief in support of Respondents pursuant to rule 36.4 of the Rules of the Supreme Court of the United States. The Amici States share a long-standing and general interest in maintaining railroad facilities, not only to provide current service within their respective jurisdictions but also to foster economic development. Rail transportation has been, and continues to be, the most energy efficient form of land-based transportation, and is the least costly means of transport available for many industries. Further, loss of rail service can have devastating consequences for communities, not only resulting in the closure of otherwise operational industrial plants, lumber mills and yards, and grain elevators but also sharply curtailing the ability of the local communities to attract new industry and business in the future.

The States originally exercised their power to preserve rail facilities through the charters which they granted railroads operating within their jurisdictions. These charters constituted "rigid barriers" to rail abandonment, rendering such abandonment largely impossible absent state and local government consent.¹ In order to liberalize the ability of railroads to abandon at least some lines, Congress adopted the Transportation Act of 1920 expressly granting jurisdiction to the Interstate Commerce Commission (ICC) to approve both discontinuance of service (in which service or operational obligations are cancelled but a facility remains intact) and abandonment of a line (in which the facility may be dismantled as well).² ICC, however, used this new power sparingly, viewing itself, with the encouragement of the

¹ T. Keeler, *Railroads, Freight and Public Policy* 25 (Brookings 1983). Cf. *Missouri P. R. Co. v. Kansas*, 216 U.S. 262, 278-79 (1910) (obligations of state charter).

² T. Keeler, *supra*.

States, as an enforcer rather than an abridger of the original State charters.³

Faced with several major rail system bankruptcies, federal rail policy, commencing in the latter part of the 1970's, shifted in favor of enhancing current economic returns to the rail industry by facilitating tariff increases and cessation of service from non-self-supporting lines.⁴ The shift in policy produced a surge in the level of rail line abandonments, to a rate of approximately 3000 miles per year.

States have responded in two ways. First, most States have programs to assist their shippers in preserving lines for current use. Second, many States have adopted a variety of programs, some quite comprehensive, to "rail-bank" and otherwise preserve corridors for future use where current rail use cannot be preserved under ICC's present lenient approach to rail abandonment approvals. Congress, recognizing the legitimate public interest in maintaining intact existing transportation corridors, has responded more narrowly with railbanking programs that are dependent on state or local involvement for their effectiveness. An example of such a program is section 8(d) of the National Trails System Act (16 U.S.C., § 1247(d)) ("section 1247(d)"), which enlists the cooperation of state and local agencies willing to pay the ongoing costs associated with preserving a corridor.

Many states and local governments are actively employing section 1247(d) pursuant to orders obtained in ICC rail regulatory proceedings. For example, in California, both El Dorado and San Mateo counties have invoked section 1247(d) in efforts to preserve railroad lines for future use. The Commonwealth of Pennsylvania, through its Department of Environmental Resources, has undertaken steps to lease for interim trail purposes, and

³ *Id.* at 39.

⁴ E.g., *T. Keeler, supra*, at 105.

to preserve for possible restoration for future rail service, 62.2 miles of environmentally sensitive railroad right-of-way in north central Pennsylvania.⁵ Similarly, the State of Missouri, through its Department of Natural Resources, has assumed responsibility for railbanking and interim trail use of the 199-mile long former mainline of the Missouri-Kansas-Texas Railroad, extending from Machens (near St. Louis) to Sedalia (southeast of Kansas City), paralleling the Missouri River.⁶ State and local agencies have railbanked rail corridors under section 1247(d) in Iowa (three major corridors totalling over 100 miles), Utah (over thirty miles), Ohio (over 15 miles) and Maryland (six miles in Bethesda and Silver Spring), and a number of other States including Florida, South Carolina, Minnesota, South Dakota, Wisconsin and Oklahoma are preparing to railbank under the provision.

The result sought by petitioners, namely, the invalidation of section 1247(d), would obviously jeopardize the interests of Amici States in maintaining rail corridors intact for future rail service. The assault by petitioners upon the federal statute threatens State efforts to preserve rail corridors generally, and, as explained in our Brief, in effect, challenges the core of federal (and, to

⁵ See Consolidated Rail Corporation - Abandonment Exemption - Lycoming and Tioga Counties, Pa., ICC Dkt. AB-167 (Sub-no. 1089X) (unpublished but available through Lexis-Trans), served Sept. 14, 1988 (issuing "notice of interim trail use" applying section 8(d) of the Trails Act).

⁶ Arguments such as those presented by petitioners to this court have been rejected in litigation involving Missouri's railbanking efforts. *Glosemeyer v. Missouri-Kansas-Texas R. Co.*, 685 F.Supp. 1108 (E.D. Mo. 1988), *aff'd* ___ F.2d ___, (No. 88-1863) (8th Cir. July 5, 1989).

the extent not preempted, State) regulation of rail abandonments.

INTRODUCTION

Petitioners' arguments, if accepted, would undermine the ability of the federal government and, to the extent not preempted by federal regulation, State governments, to regulate railroad corridors for future reactivation of rail service. Such regulation has been viewed as easily within the federal government's power under the Commerce Clause and as raising no significant Fifth Amendment issues regarding so-called "reversionary" interests claimed by abutting property owners, such as the petitioners in this proceeding. Petitioners present no arguments justifying reversal of this long standing doctrine.

Section 1247(d) – which is petitioners' nominal target in this proceeding – is fully consistent with traditional and historically recognized federal (and, where not preempted, State) railroad regulatory power. It neither constitutes a taking without just compensation in violation of the Fifth Amendment nor does it exceed Congress' power under the Commerce Clause. The relief sought by petitioners should be denied and the decision below of the United States Court of Appeals for the Second Circuit should be affirmed.

STATEMENT OF THE CASE

Amici adopt respondents' Statement of the Case.

SUMMARY OF ARGUMENT

Section 1247(d) is clearly within the power of Congress under the Commerce Clause. Congress' power

under the Commerce Clause turns on the legitimacy of the purpose of its exercise, and the relationship of the means to that purpose. Section 1247(d) of the Trails Act serves at least two legitimate federal purposes: (1) preservation of rail lines for future rail use ("railbanking"), and (2) provision of some additional trail opportunities in the interim. Both purposes are legitimate objectives under the Commerce Clause. The means provided by the statute are eminently suited to these objectives. The interim trail use maintains the corridor intact for future rail use, and also, by defraying the cost of maintaining the corridor, does so without burdening rail transport and interstate commerce.

Section 1247(d) also comports with the Fifth Amendment. The provision is part and parcel of comprehensive and plenary federal rail regulation, which has never heretofore been viewed as a "taking." For example, ICC has long enjoyed authority to authorize an indefinite discontinuance of service rather than outright abandonment. This has precisely the same impact as section 1247(d) on adjacent landowners claiming some sort of "reversion" or other interest in the corridor upon cessation of current rail service. *See* 54 Fed. Reg. 8011-13 (Feb. 24, 1989) (1247(d) similar to discontinuance). Further, section 1247(d) is a railbanking statute; this purpose has heretofore been uniformly recognized as a legitimate rail regulatory objective. It is reasonable regulation rather than a taking.

In any event, takings are not necessarily barred by the Constitution. Rather, the Constitution requires only that if there is a "taking," just compensation must be paid. If a taking results from an application of section 1247(d) by the ICC, the Tucker Act (28 U.S.C. § 1491) is available to afford a full and complete remedy.

ARGUMENT

I

SECTION 1247(d) IS WELL WITHIN CONGRESS' POWER UNDER THE COMMERCE CLAUSE

Petitioners contend that 16 U.S.C. section 1247(d) is "not a valid exercise of the Commerce Clause." Petitioners argue that the "rail bank" purpose of the statute is "pretextual" and thus inadequate to sustain Congress' action under *Nollan v. California Coastal Commission*, ___ U.S. ___, 108 S.Ct. 3141 (1987). Petitioners' claim lacks merit. All courts which have examined the question have determined that section 1247(d) is a valid exercise of Congress' power under the Commerce Clause. *Preseault v. I.C.C.*, 853 F.2d 145, 150 (2d Cir. 1988); *Glosemeyer v. Missouri-Kansas-Texas R. Co.*, 685 F.Supp. 1108, 1112-18 (E.D. Mo. 1988) aff'd, ___ F.2d ___, No. 88-1863, Slip. Op. at 12-13 (8th Cir. 1989) ("Congress acted rationally in enacting section 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose"); *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 705 (D.C. Cir. 1988) ("[n]o one doubts that Congress has authority to provide that rights-of-way no longer needed for rail use be converted to trails . . .").

Under Commerce Clause analysis, the scope of judicial review is "relatively narrow." *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 276 (1981). Such limited judicial review is required because the Commerce Clause constitutes a grant of "plenary authority" to Congress. *Ibid.* This power is "complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are presented by the constitution." *Ibid.*

Thus, an exercise of the Commerce Clause will be upheld where, "(1) there is any rational basis for a congressional finding that the regulated activity affects interstate commerce; and (2) the "means chosen by [Congress

are] reasonably adapted to the end permitted by the Constitution." *Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

Section 1247(d) rationally serves at least two legitimate purposes. *First*, it fosters preservation of rights-of-way for future rail use. See *Glosemeyer*, 685 F.Supp. at 1117-18, aff'd ___ F.2d at ___ (Slip Op. at 13-14). (discussing federal railbanking interest). That purpose was recognized as legitimate long before the advent of section 1247(d). E.g., *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973) (federal agency "does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.")⁷ *Second*, section 1247(d) fosters interim use of the right-of-way as a trail, which is also legitimate. *National Wildlife Federation*, 850 F.2d at 705 (even if purpose is solely to encourage recreational trails, statute is within congressional power).

The remaining question for Commerce Clause purposes is "whether the means adopted by [C]ongress in 16 U.S.C. § 1247(d) are reasonably adapted" to the purposes of the statute. *Preseault v. I.C.C.*, *supra*, 853 F.2d at 149. This question is readily addressed. The trail use, aside from addressing interim recreational and commuting needs, serves two important rail regulatory functions. Operation of a trail in the right-of-way preserves the continuity of the corridor and inhibits encroachments and activities inconsistent with restoration of rail service - it preserves and guards the integrity of the corridor. Under the terms of section 1247(d) the interim trail user must shield the railroad from financial and managerial responsibility for the corridor. In other words, the interim trail

⁷ State law also generally recognizes preservation of corridors as a legitimate railroad purpose. *Hennick v. Kansas City Southern Railway Co.*, 269 S.W.2d 646, 653 (Mo. 1954); *St. Louis-San Francisco Ry. Co. v. Dillard*, 43 S.W.2d 1034, 1037 (Mo. 1931) (right to anticipate future needs).

user rather than the rail carrier pays the on-going costs associated with the railbank. Thus, the rail regulatory objective of railbanking is served without any additional burden to interstate commerce. The statute accordingly encourages the preservation of rail corridors for future use in situations where the corridor is suitable for less burdensome and less costly interim viatic uses. In the words of the Second Circuit:

"Section 1247(d) enables railroads that wish to discontinue service to help preserve rights-of-way for future rail use, when they might otherwise seek to abandon a line; it protects the railroad from liability in the interim; and it provides for maintenance of the right-of-way by the trail user during the interim. This seems a remarkably efficient and sensible way to achieve both goals. We conclude that it constitutes a valid exercise of [C]ongress's authority under the [C]ommerce [C]ause."

Id., 853 F.2d at 150.⁸ *Accord*, *Glosemeyer*, ___ F.2d at ___ (Slip. Op. at 14).

Petitioners, however, cite this Court's decision in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107

⁸ "As both the plain language of § 1247(d) and its legislative history indicate, § 1247(d) is designed to further the railbanking policies of the 4-R Act and to encourage the recreational and conservational policies of the National Trails System Act. It is intended to 'protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed' and to 'assist recreational users by providing opportunities for trail use on an interim basis where such situation exists.' H.R. Rep. No. 98-28, 98th Cong., 1st Sess. 1, 9, reprinted in U.S. Code Cong. & Ad. News 1983, pp. 112, 120. By serving both interests, it reflects, to borrow the words of the Secretary of Transportation, Congress' awareness that railroad abandonments constitute a 'significant problem,' ripe for 'opportunity.'" *Glosemeyer*, 685 F. Supp. at 1117.

S.Ct. 3141 (1987) for the broad proposition that an exercise of congressional authority under the Commerce Clause is subject to a heightened standard of judicial review when the governmental action is alleged to have taken property. Petitioner's reliance is misplaced. Whether a statute or regulation amounts to a taking is an "entirely different question," than whether a statute is a legitimate exercise of Congress' plenary authority under the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). *Nollan* involved state police power regulation, not an exercise of the Commerce Clause. Nothing in *Nollan* presages the wholesale evisceration of congressional power. Rather, as respondent Vermont Agency of Transportation observed in their Brief in Opposition to the Petition for Writ of Certiorari (page 11), "[Nollan] involves traditional analysis of a state's general police powers – as applied to strictly private property, not already encumbered by a public servitude – when those police powers are alleged to conflict with the Fifth Amendment."

In contrast, the courts which have addressed the issue have typically characterized section 1247(d) as part of the "comprehensive federal scheme regulating railroads and thus subject to Commerce Clause analysis and the rational basis test." See *Glosemeyer*, *supra*, ___ F.2d at ___ (Slip. Op. at 12) citing *Hodel*, 452 U.S. 264, aff'ing 685 F.Supp. at 1117-1119.

Nollan, moreover, is distinguishable on other counts as well. For example, in *Nollan*, this Court found that regulatory requirement at issue "utterly fail[ed] to further the ends advanced as the justification for their prohibition." ___ U.S. at ___, 107 S.Ct. at 3148. That is simply not the case here. Section 1247(d), as previously indicated, is specifically tailored to further the government's legitimate interest in railbanking and does so in a "remarkably efficient and sensible way." *Preseault*, 853 F.2d at 150. (See section II, *infra*.)

SECTION 1247(d) IS VALID UNDER THE FIFTH AMENDMENT⁹

Because petitioners' challenge arose in the context of a facial challenge (see *Preseault v. I.C.C.*, 853 F.2d 145, 150 (2nd Cir. 1988)), the sole question is whether the "mere enactment" of section 1247(d) constitutes a taking. *Keystone Bituminous Coal Assn. v. De Benedictis*, 480 U.S. ___, 107 S. Ct. 1232, 1247 (1987). The test to be applied in considering this facial challenge is "fairly straightforward." *Ibid.* The "mere enactment" of a statute does not affect a taking of property if it substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Nollan*, ___ U.S. at ___, 107 S. Ct. at 3146. Thus, Petitioners "face an uphill

⁹ It appears to *amici* that the constitutional issue tendered by petitioners is not ready for disposition by this Court. Under well-established jurisdictional and prudential considerations, this Court refrains from deciding constitutional questions unless it is absolutely necessary to do so. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-572 (1947). The Court does not decide abstract, hypothetical, or contingent questions of constitutional law, and this includes situations where there is some other ground on which the case may be disposed of, as well as situations where the party requesting a decision of the constitutional issue fails to show that he is injured by the operation of the challenged statute. *Id.*, 331 U.S. 569, 570, n. 34. Here, it may be that the statute has no impact whatsoever on petitioners. If the railroad owns the rail corridor in fee, and petitioners have absolutely no interest in it, whether as reversioners or as fee owners subject to an easement, then the "taking" issue is not presented for decision. The lower court expressly refrained from resolving the question of ownership. *Preseault*, 853 F.2d 145, 150. Under such circumstances, the most appropriate course may be dismissal of the writ of certiorari as improvidently granted. See Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) § 5.15, pp. 288-293.

battle" in making a facial attack on section 1247(d) as a taking. *Keystone*, 480 U.S. at 495.

1. ICC Regulation of Railroad Abandonments Is Plenary, Exclusive and Comprehensive

The Interstate Commerce Commission ("ICC") regulates abandonment of railroad lines and discontinuance of service on rail lines. In general, no rail line may be abandoned, and no rail service may be discontinued, absent a finding by the ICC that the abandonment or discontinuance comports with the present or future public convenience and necessity (49 U.S.C. §§ 10903-06), or that the line qualifies for an exemption from such a finding. 49 U.S.C. § 10505 and 49 C.F.R. § 1152.50.

In exercising its authority, ICC may, in whole¹⁰ or in part,¹¹ deny proposed abandonments and discontinuances (49 U.S.C. § 10903), or, in the case of an abandonment, order the line transferred to another entity for continued railroad purposes notwithstanding the objection of the original carrier. 49 U.S.C. § 10905.¹² In discharging this authority, the ICC must also comply with a host of other generally applicable federal statutes, including section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f; 16 U.S.C. § 1451 et seq. (Coastal Zone Management Act); section 7 of the Endangered Species Act, 16 U.S.C. § 1536; and section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332. Pursuant to

¹⁰ E.g., *Southern Pacific Transp. Co. - Abandonment - El Dorado and Sacramento Counties, CA*, AB-12 (Sub No. 113) (unpublished), served Aug. 10, 1987, *aff'd*, *Southern Pacific Transp. Co. v. ICC*, 871 F.2d 838 (9th Cir. 1989).

¹¹ E.g., *Baltimore & Annapolis Railroad Co. - Abandonment*, 348 ICC 678 (1976).

¹² *Chicago & North Western Transp. Co. v. U.S.*, 678 F.2d 665 (7th Cir. 1982) (§ 10905 was specifically intended to permit ICC to compel transfer of otherwise moribund freight line for passenger rail use).

these authorities, ICC has imposed conditions on abandonments and delayed the effectiveness of abandonments.¹³

This Court has emphasized that "the authority of the Commission to regulate abandonments is exclusive"; the agency's "authority over abandonments is . . . plenary"; and this authority "is critical to the congressional [regulatory] scheme, which contemplates comprehensive regulation of interstate commerce." *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320, 321 (1981).

Thus, while state law generally determines the rules governing easements, reversions and other traditional property interests, it nonetheless, operates subject to the ICC's "exclusive and plenary" authority to regulate railroad abandonments. *Chicago and N. W. Tr. Co.*, 450 U.S. at 319 ("state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.") See also *Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F.Supp. 383, 384 (M.D. La. 1985), *aff'd*, 775 F.2d 300 (5th Cir. 1985); *State of Mich. Dept. of Transp. v. I.C.C.*, 698 F.2d 277, 279-80 (6th Cir. 1983); *Matter of Boston & Maine Corp.*, 596 F.2d 2, 5-6 (1st Cir. 1979) (state jurisdiction over rail line limited; federal regulation of line applies "not merely to service being provided but the physical properties and interests" and ICC had power to regulate abandonment of the line itself, i.e., the "rail properties"); *State of Idaho v. Oregon Short Line R. Co.*, 617 F.Supp. 207, 212 (D.C. Idaho 1985) (in rail context "Congress could preempt or override common law rules regarding easements, reversions, or traditional real property interests"). Accordingly, until the ICC issues a certificate of abandonment the railroad property remains

¹³ E.g., *Burlington Northern Railroad Co. - Abandonment Exemption - Fall River and Custer Counties, So. Dak.*, AB-6 (Sub-no. 293X) (unpublished), served Jan. 4, 1989 (discussing ICC's efforts to comply with section 106 of NHPA in the context of a 41-mile abandonment in the Black Hills area of South Dakota).

subject to ICC jurisdiction and state law may not cause a reverter of the property. (*Colorado v. U.S.*, 271 U.S. 153, 165-166 (1936); *National Wildlife Federation*, 850 F.2d at 703-704.)¹⁴

It was in this context that section 1247(d) was enacted and implemented by the ICC.

2. Section 1247(d) Substantially Advances Legitimate Federal Interests

Section 1247(d) emerged from congressional "concern over railroad abandonments and their consequent effect on the interstate rail network." *Glosemeyer*, 685 F. Supp. at 1115 (E.D. Mo. 1988), citing 90 Stat. 144, 145. Reports indicated that abandonments were occurring at a rate of approximately 3000 miles per year and were expected to continue at that level or to increase. See *id.* discussing U.S. DOT, *Availability and Use of Abandoned Railroad Rights-of-Way* (1977). A major problem in providing for "rail banking" for future rail reactivation was, however, financing the management of the corridor without burdening the rail industry, which was faced with low returns and significant system bankruptcies. See *Glosemeyer*, 685 F. Supp. at 1115 n.6.¹⁵

¹⁴ The key finding of section 1247(d) is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes shall not constitute an abandonment of such rights-of-way for railroad purposes. *Glosemeyer*, 685 F.Supp. at 1117, quoting from H. R. Rep. No. 98-28, 98 Cong., 1st Sess. 1, 8, reprinted in U.S. Code Cong. and Ad. News, pp. 112-119.

¹⁵ Certainly it is reasonable for Congress to provide a mechanism for a railroad to reduce costs associated with conserving lines for future use in interstate commerce. Indeed, in some states, railroads are permitted to lease portions of railroad right-of-way easements for non-rail purposes in order to defray costs. See *Marthens v. B & O Railroad Co.*, 289 S.E. 2d 706,

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Section 1247(d) addresses this problem by providing a mechanism for State and local agencies (rather than the rail carrier) to finance corridor preservation for future rail use in return for interim trail use. In "furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use," section 1247(d) provides for the interim trail user to relieve the railroad of management, legal and tax responsibility and for the corridor to be preserved intact for reactivation for rail purposes. See *Glosemeyer, supra*, citing H.R. Rep. No. 28, 98th Cong., 1st Sess. 1, reprinted in 1983 U.S. Code Cong. & Admin. News 119. Under section 1247(d), a line remains under the jurisdiction of ICC, which can order its restoration for active rail use, so long as the railroad is relieved of all current liabilities for the line and it is devoted to interim recreational trail use. See *Hayfield Northern R. Co. v. Chicago & N. W. Tr. Co.*, 467 U.S. 622, 636 (1984) (railroad may lawfully be barred from abandoning a right-of-way especially when "the costs of continued operation are lifted from the carrier"). The Commission implements section 1247(d) through the issuance of a "certificate of interim trail use" ("CITU") or a "notice of interim trail use" ("NITU"). See 49 C.F.R. § 1152.29.

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711-12 (W.Va. 1982) ("Economic factors, changes in operational methods and the ebb and flow of business often make it impossible to use an entire tract of land for railroad purposes on a continuous basis. Yet, to hold that all land not in actual use must revert, even if unused or leased for only a short time, is unrealistic and in most instances would probably run contrary to the bargain that the original parties to the deed intended. Public policy dictates that railroads must be allowed some latitude in their use of land, particularly the right to lease property on a short-term basis [for totally non-rail purposes] in order to contribute to their fixed costs during periods when railroad activities are cyclically depressed").

"Rail banking" ends traditionally have been accomplished by simply denying abandonment, or by denying abandonment but granting a discontinuance of service (thus allowing tariffs to be cancelled so no common carrier obligation remains, but preserving the rail line intact).¹⁶ Section 1247(d) is tantamount to the granting of discontinuance but not abandonment. Indeed, as ICC recently stated:

A railroad's decision to enter into a Trails Act agreement is similar to a carrier's decision to seek discontinuance rather than full abandonment authority for a particular line. Discontinuance authority, like rail banking, allows a railroad to cease operating a line for an indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future. By contrast, once a carrier exercises the authority granted in a regular abandonment certificate the line is no longer part of the national transportation system. Because the carrier's full interest in such lines generally is sold upon abandonment, the rail corridor would have to be reassembled prior to the resumption of rail service.

54 Fed. Reg. 8012-13 (Feb. 24, 1989).

The only real distinction between old-style discontinuance and application of section 1247(d) is that under the latter, interim trail use is formally permitted pending future rail use.¹⁷ As with "discontinuance," Congress

¹⁶ A case in point is *Baltimore & A. R.R. - Abandonment, supra*, 348 ICC 678 (1976), where the railroad sought a discontinuance of service rather than an abandonment for the express purpose of preserving the corridor intact for possible future use.

¹⁷ The primary advantage of a railbanking program as opposed to old-style discontinuance is that the former, by interposing an interim trail manager (usually a State or local agency), ensures that the corridor is maintained, taxes (if any) are paid, legal liability problems are satisfied, and that the

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expressly provided in section 1247(d) that interim trail use and railbanking should not be deemed abandonment of service (triggering "reversionary" rights which would destroy the corridor) for purposes of State or local law. See *Glosemeyer*, 658 F.Supp. at 1117, *aff'd* ___ F.2d at ___ (Slip. Op. at 7).

Petitioners in effect argue that this is a fundamental shift in use which bears an insufficient nexus to legitimate rail regulatory purposes to avoid being a taking after the *Nollan* decision and that the railbanking purpose is a pretext or otherwise contrived.

The short answer to petitioners' claim is that a "court will not strike down an otherwise constitutional statute on the basis of alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The longer answer is that the nexus between section 1247(d) and rail regulatory purposes is not contrived. To the contrary, the interim trail use is subservient to the rail regulatory purpose. The corridors to which section 1247(d) is applied remain subject to ICC jurisdiction for purposes of restoration of rail service. Further, the statute obligates the interim trail user not only to acknowledge the availability of the line for rail reactivation but also to defray all costs and liabilities associated with the railbanking period. The whole thrust is to relieve the rail carrier, and current interstate commerce, of the costs associated (i.e.,

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right-of-way during the railbanking period will not regress into a public nuisance. ICC recently confirmed that interim trail use serves to assure suitable management of railbanked corridors. The agency determined that there was no evidence of tax or managerial problems on rail corridors used for interim trails (Rail Abandonments - Use of Rights-of-Way as Trails, Ex parte 274 (Sub-no. 13) (unpublished), served May 26, 1989, at 6), that in fact "it is clear that there have been no significant maintenance problems on these trails," (*Id.* at 6 n. 9) and that the "trail use enhances rather than detracts from the aesthetic and economic value of surrounding property." *Id.* at 3.

taxes, costs related to maintaining corridors, legal liability, et al.) with preserving the line for the benefit of future rail use; namely, to permit railbanking without burdening the railroad or current shippers.

Further, as ICC and the Interior Department have noted, the statute does so in a fashion designed to foster the aesthetic benefits and economic value flowing to surrounding property. The statute has repeatedly been employed in contexts in which potential future rail service users - or their local or State governments on their behalf - desire to preserve a corridor for future rail use. E.g., *Chicago & North Western Transp. Co. - Abandonment - Guthrie and Dallas Counties, Iowa*, ICC Dkt. AB-1 (Sub-no. 192X) (unpublished), served May 7, 1987 (electric utility seeks preservation of right-of-way for future generating station near Des Moines through interim trail use). Indeed, in the so-called "Katy" case, singled out by one of petitioners' amici for special opprobrium,¹⁸ the local electric utility, Union Electric, commented in favor of preservation of at least a significant portion of the line (a former mainline eminently suitable for railbanking) for possible future use to supply coal and to assist in construction activities in the future.

One senses that petitioners Preseault, et al., and their amici are attempting to make section 1247(d) a victim of its own rationality; they seem almost to complain that the statute so well serves interim recreational ends, that it must be flawed. It does indeed accomplish recreational objectives, but it also speaks directly to rail regulatory purposes and serves them exceedingly well in an efficient and unambiguous fashion. More bluntly, the fact that the interim trail user draws a recreational benefit does not erase the basic rail regulatory purpose, nor should it provoke courts to grope for a way around that purpose. As the Second Circuit said:

¹⁸ Nat'l Assoc. of Rev. Prop. Owners Brief at 6-7.

"To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle [C]ongress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country."

Preseault, supra, 853 F.2d at 151.

Petitioners, however, also complain that ICC treats section 1247(d) as "ministerial," imposing railbanking only if a State or local agency steps forward and if a railroad assents.¹⁹ To be sure, ICC has adopted a

¹⁹ Pet. Brief at 41. As a corollary, petitioners complain that ICC first makes a finding that the line is suitable for abandonment, and that abandonment will ultimately follow if the State or local agency and the railroad do not reach a railbanking agreement, or if the interim trail user determines it can no longer afford to bear ongoing costs of the railbank. Pet. Brief at 42. But these aspects of the statute are an inherent nature of the Commission's interpretation of it as voluntary on the part of the railroads, and the clear language of the statute which makes it voluntary on the part of state and local governments.

Petitioners also object that ICC makes no finding that the line is suitable for railbanking, but instead relies on the railroad and State and local agencies for this purpose. Pet. Brief at 42-43. This complaint misfires for several reasons. First, although ICC does not make an express finding on utility for future use under section 1247(d) it is required to make a public use finding under 49 U.S.C. § 10906 for any line it authorizes for abandonment. This finding, although frequently not expressed in the agency's abandonment order, is generally found in the "environmental" documentation compiled by the ICC to comply with the National Environmental Policy Act (NEPA) and other "environmental" statutes. This § 10906 process largely if not completely supplants the need for an express railbanking finding. Further, since railbanking is not cheap, the Commission can properly presume that State and local agencies and rail carriers will not engage in it unless they think it reasonable for a particular line. Finally, railbanking is inherently a "prediction," a "hedge," or a "bet" on the future - a

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"ministerial" approach to the statute. But the agency argues that this minimizes its own burdens and is consistent with the "deregulatory" thrust of the Staggers Act,²⁰ the basic railroad regulatory statute within which section 1247(d) operates. Several courts of appeal, in deference to the agency's "deregulatory" direction, have held that ICC's ministerial approach is within its discretion.²¹ If ICC's ministerial approach nonetheless poses some constitutional problem, the answer is not to invalidate the statute, but to require ICC to exercise discretion in the fashion previously advocated by several of the Amici States, as set forth in the margin.²²

(Continued from previous page)

community wishes to retain a rail corridor as a lure to future industrial development, or to preserve the option. It is unclear with purpose an express finding of railbanking suitability would serve, other than recognizing that a local or State agency is interested, something that is already clear on the face of the proceeding.

²⁰ See *People of the State of Ill. v. I.C.C.*, 722 F.2d 1341, 1347 (7th Cir. 1983).

²¹ E.g., *Washington Dept. of Game v. I.C.C.*, 829 F.2d 877 (9th Cir. 1987); *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C.Cir. 1988); *Conn. Trust for Historic Preservation v. I.C.C.*, 841 F.2d 479 (2d Cir. 1988).

²² Several states have argued that ICC's current approach is too "ministerial," that ICC must require the transfer of a right-of-way for railbanking and trail use upon request of a State or local government, and that ICC must set terms and conditions of transfer if a voluntary agreement cannot be achieved (i.e., that the Commission should adopt an approach similar to its approach for mandatory transfer for continued rail service under 49 U.S.C. § 10905). After all, the statute on its face says that ICC "shall not" order an abandonment but instead "shall" set terms and conditions for railbanking when an appropriate railbanking manager steps forward and agrees to assume on-going costs. "Shall" is ordinarily mandatory

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3. Section 1247(d) Does Not Substantially Affect the Value of Reversionary Interests or Otherwise Interfere With Reasonable Investment Backed Expectations

In determining whether the railbanking program deprives Petitioners of "economically viable use of his land," takings analysis requires a "comparison of the value that has been taken from the property with the value that remains in the property . . ." *Keystone*, 480 U.S. at 497. The economic impact of section 1247(d), if any, is nominal and does not deprive Petitioners of viable use of their reversionary interest. In fact, operation of section 1247(d) enhances both the economic and aesthetic value of the servient estate.

When land is taken for such purposes as a highway or railroad, both of which require a permanent and substantially exclusive occupation of the surface, the distinction between a taking of the fee and of the easement has been described as having "no practical application in the determination of the compensation to be assessed for the land actually taken":

"While the damages to the owner's remaining land may be less if the use of the land taken is limited by the nature of the easement, the interest remaining in the owner of the fee in the land taken is in such case of nominal value, and he is awarded the same

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when used in a statute. *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). Further, mandatory application of section 1247(d) where a state or local agency steps forward willing to assume on-going costs and otherwise abide by necessary terms and conditions of transfer foster even better the purposes of section 1247(d) than ICC's "ministerial" regime. At the very least, the language of the statute is broad enough to afford ICC discretion to require transfers under terms and conditions set by the agency in at least some situations without railroad consent.

measure of compensation for the land actually taken as if the fee was acquired by the condemning party, namely, the full market value of the land."

4 J. Sackman, *Nichols on Eminent Domain*, § 12.41[2] (rev. 3rd ed. 1985); also see *Southern Pac. R. R. Co. v. S. F. Sav. Union*, 146 Cal. 290, 79 P. 961 (1905). Thus, the value of a reversionary interest in a railroad or other public right-of-way is *de minimis*. Accordingly, to the extent operation of section 1247(d) diminishes the value of Petitioners' property interest, the impact is negligible. In other words, Petitioners, upon the acquisition of the easement by the railroad, have already been fully compensated for the loss of their interest. Any additional payment would amount to an undeserved windfall which is neither required nor compelled by the takings clause.

Moreover, in granting a railroad interest (whether a lease, an easement, or a license), the private landowner is, in effect, submitting his or her remaining "reversionary" interests to State and federal public highway and railroad regulatory ("common carrier") regulation. Phrased another way, when a party grants a less than fee interest to a rail carrier, he or she grants that interest with the presumptive knowledge that a rail corridor is a "public highway"²³ and that a rail carrier is subject to extensive State and federal regulation which may change over time. See *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 481-82 (1910), quoting *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1906). For example, in *Union Bridge, supra*, this Court rejected a claim that a government order, under the authority of the Commerce Clause, requiring a bridge company to make certain costly alterations in a

²³ See *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641, 657 (1890) ("[A] railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends and therefore, subject to governmental control and regulation.")

bridge crossing navigable waters of the United States, effected a taking of property. This Court observed:

"[I]t must be taken . . . upon principle not only that the company, when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded exert its power by appropriate legislation to protect navigation against unreasonable obstructions." 204 U.S. at 400-401.

Similarly, for as long as the ICC determines that the land will serve a "railroad purpose," it retains jurisdiction over rights-of-way and "it does not matter whether that purpose is immediate or in the future." *Preseault*, 853 F.2d at 151.

When Petitioners' interest is viewed in the context of the pervasive governmental authority under the Commerce Clause and the extent to which Petitioners have already been fully compensated for their property, it is apparent that they simply have no "reasonable investment backed expectations" (e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978)) to the "public highway" so long as it is regulated and used as such.

Petitioners, however, citing *Loretto Teleprompter Manhattan CATV Corp.*, 488 U.S. 919 (1982) assert that section 1247(d) operates as a "physical occupation" and thus constitutes a taking regardless of the economic impact. The flaw in this argument is that the railroad, not the nominal owner in fee, maintains indefinite and exclusive use and occupancy of the land. Accordingly, there is no physical invasion of the fee owner's interest. Instead, the question raised by Petitioners' claim is whether section 1247(d) is a "lawful exercise of power to which the interests of [reversionary] owners have always been subject." *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704-705 (1987).

Numerous courts, consistent with the characterization of railroads as public highways, have held that other uses of a rail right-of-way which are compatible with the

purpose for which the easement was originally acquired (i.e., public travel) are permissible and do not trigger a reversion of the residual interest. *State ex rel. Wash. Wildlife Preservation v. State*, 329 N.W.2d 543, 546-547 (Minn. 1983); *Haussler v. Braun*, 314 N.W.2d 4 (Minn. 1987).

Interim recreational trail use pending restoration for future rail use preserves an existing condition; it imposes no new or additional burdens on the reverter interest. Further, it is entirely consistent with the scope and purpose of the original public servitude and does not materially increase the burden on the servient estate.²⁴ On the contrary, trail use enhances rather than detracts from the aesthetic and economic value of the surrounding property. See fn. 16.

Consequently, section 1247(d) does not result in a diminution in the value of Petitioners' property interest. Rather, "it is an incidental consequence of the lawful and proper exercise of government power." *Union Bridge Co.*, 204 U.S. at 390. In any event, as has been previously stated, the ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate no reversionary interest can or would vest. Thus, as the court below concluded, Petitioners' reversionary interest, if any, "is not postponed any more by the operation of section 1247(d), than it could otherwise be affected

²⁴ In *State ex rel. Wash. Wildlife Preservation v. State*, 329 N.W.2d at 547 (Minn. 1983), the Minnesota Supreme Court upheld a state rails to trails program somewhat similar to the federal regime. ("The right-of-way is still being used as a right-of-way for transportation even though abandoned as a railroad right-of-way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purpose for which the easement was originally acquired. . . .") Also see *Faus v. City of Los Angeles*, 67 Cal.2d 350, 62 Cal.Rptr. 193, 431 P.2d 849 (1967).

by the ICC's continuing jurisdiction." *Preseault*, 853 F.2d at 151.)

Finally, Petitioners assert that the holding in *Preseault* conflicts with the holding in *National Wildlife Federation v. I.C.C.* The Court of Appeals in the latter case remanded (but did not reverse or vacate) ICC's regulations implementing section 1247(d) for further findings concerning whether application of that provision in the narrow instance of parcels of rail line held by railroads solely in the form of railroad right-of-way easements might constitute a "taking." To the extent there is a conflict, the D.C. Circuit's decision in *National Wildlife Federation* is the one in error. The *National Wildlife Federation* court tended to downplay the importance of the regulatory purposes served by section 1247(d) and failed to examine the provision in the context of longstanding federal (and State) regulation of not only railroads, but also of the property of which they are comprised. Moreover, while the Court conceded that railbanking was not "necessarily a fiction" (850 F.2d at 707), it, nonetheless, appeared to accept Petitioners' invitation to view the purposes of section 1247(d) as a "pretext." Further, the *National Wildlife Federation* court incorrectly interpreted state law as universally providing for extinguishment of railroad right-of-way easements upon cessation of rail use, notwithstanding continued public highway use. In any event, the D.C. Circuit opinion did not bar the agency – or another court – from determining that a sufficient nexus exists between section 1247(d) and rail regulatory purposes to render the regulatory impact of the provision reasonable and not a taking.

In short, Petitioners' property interest has not been substantially affected. Petitioners were fully compensated for the loss of their property upon acquisition of the right-of-way by the railroad. To the extent operation of section 1247(d) has resulted in the diminution in value of Petitioners' estate, the economic impact has been nominal and outweighed by the substantial state interest. *Agins v.*

City of Tiburon, 447 U.S. 255 (1980). (Mere diminution in the value of the property is not per se a taking). Moreover, section 1247(d) provides for reasonable regulation of rail lines to retain those lines for possible future railroad purposes without present burden to interstate commerce. Section 1247(d) finances that preservation through interim use of the lines fully compatible with their pre-existing character. It is a highly rational exercise of federal regulatory power which substantially advances the government's legitimate interest in railroad preservation.

III

IN ANY EVENT, THERE IS A JUST COMPENSATION REMEDY WHICH OBVIATES ANY FIFTH AMENDMENT OBJECTION

The Fifth Amendment of the U.S. Constitution does not bar "takings"; it simply conditions exercise of that power upon payment of "just compensation." In addition, compensation need not be paid in advance of the alleged "taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

Furthermore, if a particular application of 16 U.S.C. § 1247(d) were to result in a "taking," there is a full and adequate remedy available to displeased abutters: a suit against the United States in U.S. Claims Court under the Tucker Act, 28 U.S.C. § 1491. This assures that the statute is fully constitutional as applied here. This view was specifically upheld by both the district court and the court of appeals in *Glosemeyer*, ___ F.2d ___ (Slip. Op. at 20); 685 F.Supp. at 1120.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) parties with interests in the Penn Central Transportation Company brought suits attacking the constitutionality of the Regional Rail Reorganization Act, 45 U.S.C. section 701, contending that the Act violated the Fifth Amendment by taking property without just compensation. This Court began by observing the "general rule" that "if there is a taking . . . of property for which

there must be compensation under the Fifth Amendment, the [Federal] Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims." 419 U.S. 126-27. This Court held that the possibility of resort to the Court of Claims, now the Claims Court, under the Tucker Act provides an adequate remedy at law for any taking that might occur. "We hold," this Court said, "that while the . . . Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur." 419 U.S. 148-49.²⁵ This position has been subsequently reiterated many times by this Court. E.g., *Ruckelshaus v. Monsanto, supra*; *Duke Power Co. v. Carolina Environmental Study Group, Inc., et al.*, 438 U.S. 59, 94 n.39 (1978); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459-60 (1985).²⁶

Petitioners' argue that Congress has withdrawn the Tucker Act by 16 U.S.C. section 1249 and by Title I, section 101, 97 Stat. 42. 16 U.S.C. section 1249 applies to specifically mentioned "national trails" and has no application to 16 U.S.C. section 1247(d). The language at 97 Stat. 42 is similar to most federal authorizing statutes, barring contracts contrary to appropriations, and precluding payments except as appropriated. Such language or similar language is common in virtually all federal

²⁵ The Court rejected arguments that the Tucker Act is inadequate because Congress may not appropriate the money involved; because the remedy is delayed; and because valuation of railroad property may be complex. 419 U.S. at 148 n. 35.

²⁶ Petitioners rely heavily on *Hodel v. Irving*, 481 U.S. ____ 107 S.Ct. 2076 (1987), for the proposition that the Tucker Act is not presumptively applicable and, impliedly, that the *Regional Rail Reorganization Act* line of cases has been overruled (Pet. Brief at 32-33). The *Hodel* case did not overrule or discuss the Tucker Act. The Justice Department took the position that it was inapplicable, and no party contested that position.

authorizing statutes. Such language, however, has nothing to do with "regulatory takings." First, such "takings" are not the result of "contracts" but instead emanate from regulation. Second, they are not compensated through payments either under the program authorizing statute, or from appropriations to that particular program's implementing agency. They are compensated via a general appropriation administered by the Claims Court. In sum, any "payments" for regulatory takings are under the Tucker Act, not the Trails Act, and are provided for in advance by a general authorization and open-ended appropriations.²⁷ The evidence for withdrawal of the Tucker Act remedy advanced by petitioners is far less compelling than the evidence rejected by this Court in the *Regional Rail Reorganization Act Cases, supra*.

IV

THE CONSTITUTIONALITY OF SECTION 1247(d) SHOULD BE AFFIRMED

Petitioners have conjured up the notion of a railroad right-of-way easement, universal and rigid, whose application has been confined to the private bargain it allegedly represents from time immemorial. Such a notion is a fiction. A railroad right-of-way easement is a relatively new creature of the law, subject, like other creatures, to on-going interpretation and to new understandings under judge-made common law or under regulatory statutes. Indeed, railroad right-of-way easements, because of their public highway nature and common carrier overlay and obligations, are perhaps the most fluid of all property interests. The courts and legislatures in all states of which we are aware have viewed railbanking of railroad easements as consistent with the rights of

²⁷ The general appropriation is set forth at 31 U.S.C. § 1304, which references, inter alia, 28 U.S.C. § 2517, which in turn covers 28 U.S.C. § 1491.

the fee owner and in some states the courts have held that the railroad easement is broad enough to encompass other transportation uses (including recreational trails) wholly apart from railbanking. It represents an unduly constrictive interpretation of congressional power to suggest as petitioners do, that Congress is constitutionally barred from regarding a combination of railbanking with trail use as a permissible means of preserving rail lines already long-regulated by the federal government.²⁸ The only effect of such a holding, aside from disruption of national and State transportation policy, would be a windfall for petitioners.

²⁸ "Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce . . . , whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230 (1899).

CONCLUSION

For the reasons stated, the constitutionality of 16 U.S.C. section 1247(d) should be affirmed and the relief petitioners Preseault, et al., request should be denied.

DATED: July 28, 1989

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BRIEF

FILED

JUL 28 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

J. PAUL PRESEALT and PATRICIA PRESEALT,
v. *Petitioners,*

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF RAILS-TO-TRAILS CONSERVANCY,
NATIONAL TRUST FOR HISTORIC PRESERVATION,
CONSERVATION FOUNDATION, LAND TRUST
EXCHANGE, AMERICAN HIKING SOCIETY, LEAGUE
OF AMERICAN WHEELMEN, BAY STATE TRAIL
RIDERS ASSOCIATION, HERITAGE TRAILS FUND,
PRESERVATION ACTION, CONSERVATION
FEDERATION OF MISSOURI, VIRGINIA TRAILS
ASSOCIATION, NEBRASKA TRAILS COUNCIL, IOWA
TRAILS COUNCIL, KATY-MISSOURI RIVER TRAIL
COALITION, LEAGUE OF WOMEN VOTERS OF
MISSOURI, IOWA NATURAL HERITAGE FOUNDATION
AND SOUTHWEST IOWA NATURE TRAILS PROJECT,
INC. AS *AMICI CURIAE* IN SUPPORT OF
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1076

J. PAUL PRESEALT and PATRICIA PRESEALT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF OF RAILS-TO-TRAILS CONSERVANCY,
NATIONAL TRUST FOR HISTORIC PRESERVATION,
CONSERVATION FOUNDATION, LAND TRUST
EXCHANGE, AMERICAN HIKING SOCIETY, LEAGUE
OF AMERICAN WHEELMEN, BAY STATE TRAIL
RIDERS ASSOCIATION, HERITAGE TRAILS FUND,
PRESERVATION ACTION, CONSERVATION
FEDERATION OF MISSOURI, VIRGINIA TRAILS
ASSOCIATION, NEBRASKA TRAILS COUNCIL, IOWA
TRAILS COUNCIL, KATY-MISSOURI RIVER TRAIL
COALITION, LEAGUE OF WOMEN VOTERS OF
MISSOURI, IOWA NATURAL HERITAGE FOUNDATION
AND SOUTHWEST IOWA NATURE TRAILS PROJECT,
INC. AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENTS**

The organizations listed above respectfully file this brief as *amici curiae* in support of Respondents. Written consent has been obtained from counsel for petitioners and respondents for the filing of this brief pursuant to Supreme Court Rule 36. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

The Rails-to-Trails Conservancy ("RTC") is a non-profit, public interest corporation with over 50,000 members dedicated to assisting state and local governments and other organizations in preserving abandoned and about-to-be abandoned railroad rights-of-way for continued public use, especially for recreational trail and other compatible uses, including railbanking. Other amici joining in this brief include recreational organizations whose members use, or seek to use, rail trails, including the American Hiking Society, the League of American Wheelmen, the Bay State Trail Riders Association, the Iowa Trails Council, the Nebraska Trails Council, the Virginia Trails Association, the League of Women Voters of Missouri, and the Heritage Trails Fund.

Other amici include land preservation organizations, such as the Iowa Natural Heritage Foundation and the Land Trust Exchange. Several conservation organizations, including the Conservation Foundation and the Conservation Federation of Missouri, join in this brief. Additional amici joining in this brief are organizations supporting specific right-of-way preservation projects, such as the Southwest Iowa Nature Trails Project, Inc. and the Katy-Missouri River Trail Coalition. Finally, because preservation of rail corridors is consistent with the purposes of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, the National Trust for Historic Preservation and Preservation Action join this brief. Many of the amici, including RTC and the Iowa Natural Heritage Foundation, not only have invoked Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d)

(hereinafter "Section 1247(d)"), but also have negotiated agreements under that provision which have railbanked corridors through the mechanism of interim trail use.

STATEMENT OF THE CASE

In 1898, the Vermont legislature chartered the Rutland-Canadian Railroad Co. ("Rutland-Canadian" or "railroad"). 1898 Vt. Acts No. 160. The railroad was incorporated "for the purpose and with the right of constructing, maintaining and operating a railroad *for public use.*" *Id.* § 1 (emphasis added). The legislature gave the railroad the right of eminent domain to take, use and convey "such real and personal estate as is necessary or proper" for the construction and operation of the railroad. *Id.* Rights-of-way taken pursuant to this authority were "subject to the provisions of the general law," *id.* § 2, and "under the control of the legislature to amend or repeal as the public good may require." *Id.* § 10. Finally, the legislature granted to the railroad the right of "perpetual succession." *Id.* § 1. Thus, the railroad's rights-of-way were envisioned to last indefinitely, to be "for public use," and were subject to regulation by the legislature at any time for "the public good."

In 1899, the railroad acquired the public right-of-way in question here through its power of eminent domain.¹ At that time, the owners from whom the Preseaults claim succession were compensated for this railroad easement.²

¹ August 14, 1899 Commissioners' Award to William H.H. Barker Estate, *et al.* See Brief in Opposition to Petition for Certiorari of State of Vermont, *et al.*, Appendix C at 7a.

² Railroads generally obtained one of three types of interests in the land over which their rights-of-way ran: fee simple, fee simple determinable with a possibility of reverter, or an easement with a servient fee interest. The Preseaults argue that the railroad obtained only an easement, with the fee remaining in their predecessors in interest, even though they refer to their interest

as if the property was taken in fee simple. See 4 J. Sackman, Nichols on Eminent Domain § 12.41[2] (Rev. 3d ed. 1985). Full compensation was required because the easement was of unlimited duration and because the easement holder was given exclusive use of the property, thereby depriving the Preseaults' predecessors-in-interest of any value in the underlying fee. *Id.*

Prior to this condemnation, Congress had established the ICC and delegated to that agency plenary authority to regulate railroads.³ In 1920, Congress gave the ICC exclusive authority to permit or deny authorization for abandonment of rail lines for "present or future public convenience and necessity."⁴ The 1920 Act added a step to the abandonment process because ICC authorization was now required before a state could find that a right-of-way had been abandoned for state law purposes. The 1920 Act did not impose any additional burden on fees underlying railroad easements, however, since the holder of the easement, not the fee, enjoyed exclusive and perpetual use of the property.

In 1962, the ICC authorized the Rutland Railway Corporation ("Rutland Railway"), successor in interest to the Rutland-Canadian, to abandon its entire rail system, subject to a requirement that the company offer to sell viable segments for continued rail service. *Rutland Railway Corp.—Abandonment of Entire Line*, 317 I.C.C. 393 (1962). In 1963, the Vermont legislature authorized the state to purchase portions of the Rutland Railway for

as a "reversionary interest." Brief for Petitioners (hereinafter "Pet. Br.") at 4, 9. In this brief, amici will assume for purposes of argument that the Preseaults are correct in their assertion. In fact, it matters little whether their interest is a fee encumbered by an easement or a possibility of reverter. The analysis herein applies equally to both.

³ Interstate Commerce Act of 1887, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

⁴ Transportation Act of 1920, 41 Stat. 477 (codified as amended at 49 U.S.C. § 10903) (emphasis added).

sale or lease "to any responsible person, firm or corporation, for continued operation of a railroad, or other public purpose." 1963 Vt. Acts No. 162, § 4 (emphasis added). Rutland Railway conveyed certain lands to the State, which entered into a lease with Vermont Railway, Inc. ("VTR") in 1964 for the use of some of these lands. A 1.8 mile portion of the former Rutland-Canadian line, including the parcel in which the Preseaults claim an interest, was included in the 1964 purchase and lease in order to maintain service to an industry in the northern part of Burlington. 317 I.C.C. at 432-33. Thus, despite the 1962 authorization, this portion of the original Rutland-Canadian line was never abandoned, and the ICC retained plenary jurisdiction over it. In 1975, VTR needed materials for track repairs elsewhere, so it, with the State's permission, removed the tracks in the area of the Preseaults' property. Joint Appendix at 13-14. Neither the State nor VTR took any steps before the ICC to abandon the easement.

In July 1980, 60 years after Congress granted the ICC the authority to prohibit abandonment for future public convenience and necessity, the Preseaults purchased the property adjacent to the right-of-way "subject to all easements and rights of way of record" and obtained "any rights reverting to the owners. . . through the abandonment of the railroad right of way."⁵ Less than a year later the Preseaults and others brought suit in state court seeking to extinguish the easement and to quiet title in themselves. The Vermont Supreme Court held that the state courts lacked subject matter jurisdiction to determine whether the public right-of-way had been abandoned because the right-of-way was still subject to the ICC's plenary authority and because the state could not interfere with that authority. *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985). Subsequently, the Commission refused to authorize aban-

⁵ See copy of deed reproduced in Appendix A. The Preseaults were thus well aware of the existing railroad right-of-way.

donment of the right-of-way to the Preseaults, allowing Vermont to retain this public right-of-way for interim trail and future railroad uses. 51 Fed. Reg. 454 (Jan. 6, 1986). The United States Court of Appeals for the Second Circuit affirmed the ICC's decision, holding that preserving public rights-of-way was a valid exercise of Congress's Commerce Clause power and did not constitute a taking of property. *Preseault v. Interstate Commerce Comm'n*, 853 F.2d 145 (2d Cir. 1988). This Court granted certiorari.

SUMMARY OF ARGUMENT

The Preseaults' Commerce Clause challenge to Section 1247(d) should be rejected because the Preseaults do not contest that the railroad right-of-way at issue affects interstate commerce or that Section 1247(d) is a reasonable means of furthering the legitimate goal of encouraging recreation and conservation. No more is required for a statute to be a valid exercise of Congress's Commerce Clause power. Moreover, the other goal of Section 1247(d)—railbanking—is a reasonable response by Congress to the steady disappearance of railroad rights-of-way throughout the country. Section 1247(d) is thus, as the Second Circuit found, "a remarkably efficient and sensible way" to achieve two important goals. 853 F.2d at 150.

The Preseaults' taking argument fails because it rests on a faulty premise, *viz.*, that at some point the easement over their property was extinguished and then was taken again, entitling them to compensation for a new easement. In fact, the Preseaults now hold the same interest they have always held in the property: a fee interest subject to an easement that provides the easement holder with perpetual and exclusive use of the property. An ICC decision not to authorize abandonment of the easement, but to retain the right-of-way for public use, cannot be deemed a taking, especially when the ICC decision furthers railroad purposes and does so in a manner that is less burdensome to the fee holder than other available means of accomplishing the same end. Finally, the Pre-

seaults cannot have had a reasonable expectation under either federal or state law that this public right-of-way would be abandoned. Thus, no taking can be said to have occurred, and the ruling of the Second Circuit should be affirmed.

ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY DETERMINED THAT SECTION 1247(d) OF THE TRAILS ACT IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE BECAUSE SECTION 1247(d) IS A REASONABLE MEANS OF FURTHERING CONGRESS'S DESIRE TO PRESERVE PUBLIC RIGHTS-OF-WAY AND PROVIDE FOR INTERIM TRAIL USE.

A. Section 1247(d) Is Valid Because It Provides a Reasonable Means of Furthering the Recreation and Conservation Goals of the National Trails System Act.

In *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264 (1981), this Court reiterated the standard of review of an act of Congress under the Commerce Clause:

The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. . . . This established, the only remaining question for judicial inquiry is whether the 'means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution.'

452 U.S. at 276 (citations omitted).⁹

⁹ The Preseaults contend that this Court implicitly overruled this longstanding Commerce Clause test in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Pet. Br. at 36-39. However, *Nollan* involved a takings challenge, not a challenge to the scope of state police power or federal authority under the Commerce Clause. Nor does *Nollan* suggest that where a case involves sepa-

This standard is easily satisfied here. Congress enacted Section 1247(d) for two reasons: to preserve public rights-of-way⁷ for future reactivation of rail service ("railbanking") and to foster the recreation and conservation goals of the National Trails System Act. 16 U.S.C. § 1247(d). See also H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9, reprinted in 1983 U.S. Code Cong. & Admin. News 112, 119-120. The Preseaults do not appear to question that these twin purposes are legitimate congressional goals under the Commerce Clause. See Pet. Br. at 12, 13. See also *Glosemeyer*, slip op. at 13-14. They do not contest that the public rights-of-way involved affect interstate commerce and thus are appropriate subjects of legislation. See Pet. Br. at 12, 13. Nor do the Preseaults question that at least one of these goals—encouraging recreation and conservation—is served by Section 1247(d).⁸ See Pet. Br. at 39, 40. Because Section 1247(d) is reasonably adapted to the permissible goal of furthering the recreation and conservation objectives of the National

rate claims under both the Commerce Clause and the Fifth Amendment taking provision, the "takings" standard of review should apply to both claims, even though the deferential rational basis standard of review would remain applicable where no takings claim is alleged. *Nollan* is thus inapposite to the Preseaults' Commerce Clause claim. See *Glosemeyer v. Missouri-Kansas-Texas R.R.*, No. 88-1863 (8th Cir., July 5, 1989), slip op. at 12. We will address *Nollan* in the context of the Preseaults' taking claim. See *infra* pp. 18-19.

⁷ Railroad rights-of-way, whether held by private parties or public agencies, are considered public highways and are regulated heavily in the public interest. See *infra* pp. 9-10, 26.

⁸ The legislative history of Section 1247(d) indisputably shows that, in addition to its railbanking objectives, Congress enacted this statute in 1983 to further the goals of the National Trails System Act, which was enacted in 1968 to expand the opportunities for the American people to use and enjoy the natural, scenic, historic and outdoor recreational areas of the nation. See H.R. Rep. No. 1631, 90th Cong., 2d Sess. 7-9, reprinted in 1968 U.S. Code Cong. & Admin. News 3855, 3855-57; H.R. Rep. No. 28, 98th Cong., 1st Sess. 9, reprinted in 1983 U.S. Code Cong. & Admin. News 120.

Trails System Act, the Preseaults' Commerce Clause argument is deficient as a matter of law. See *Hodel*, 452 U.S. at 276.

B. Section 1247(d) Is Valid Because It Provides a Reasonable Means of Preserving Railroad Rights-of-Way for Future Transportation Uses.

Ignoring that Section 1247(d) is valid solely as a conservation measure, the Preseaults claim that Section 1247(d) is invalid because Congress allegedly did not really intend to preserve railroad rights-of-way and that Section 1247(d) does not, in fact, serve that purpose. Pet. Br. at 12-13. This contention is without merit; Section 1247(d)'s railbanking objective is a logical outgrowth of Congress's concern about the detrimental impact of rapidly vanishing rail corridors and the ICC's historic authority to regulate and prohibit abandonment of railroad rights-of-way.

1. Concern for Preservation of Railroad Rights-of-Way Preceded the Enactment of Section 1247(d).

The facts belie the Preseaults' claim that Congress was not concerned about the loss of rail corridors in enacting Section 1247(d). As the legislative history demonstrates, in the latter half of the 1970's, well before the passage of Section 1247(d), Congress became concerned about the economic viability of the rail industry and, in particular, about the impact of rapidly vanishing rail corridors on the national economy. S. Rep. No. 499, 94th Cong., 2d Sess. 1, 2-8, 43-44, reprinted in 1976 U.S. Code Cong. & Admin. News 14, 15-21, 58. This concern was triggered by, among other things, a 1971 Department of Transportation Report, which concluded that the 254,000 mile rail system existing in 1916 had been reduced below 200,000 miles by 1971, and that more than 21,000 miles were candidates for abandonment. *Id.* at 58.

To respond to this crisis, Congress elected to utilize the ICC's longstanding plenary authority over abandonment of railroad rights-of-way. That authority derives from the Transportation Act of 1920, which provides:

[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Transportation Act of 1920, § 402, 49 U.S.C. § 1(18), recodified as amended at 49 U.S.C. § 10903(a). As this Court has held, such authority is "critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). So broad is the ICC's power that it extends "even to approval of abandonment of purely local lines operated by regulated carriers when, in the Commission's judgment, 'the over-riding interests of interstate commerce requir[e] it.'" *Id.* at 320, citing *Palmer v. Massachusetts*, 308 U.S. 79, 85 (1939).

Congress correctly recognized that this authority provided a means for addressing the national rail crisis. This had been demonstrated in *Reed v. Meserve*, 487 F.2d 646 (1st Cir. 1973), where the court, in construing the ICC's abandonment authority under the Transportation Act of 1920, foreshadowed the railbanking and preservation concerns that would later lead to the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act")⁹ and Section 1247(d). In that case, a bankruptcy trustee petitioned the ICC to abandon a rail line. The ICC conditioned the abandonment on the "resale . . . to any responsible person for the purpose of continued operation" 487 F.2d at 647. Although a small company wished to purchase the line in order to run a scenic railroad, the trustee refused to sell the line to the scenic railway company, seeking instead to sell it to another party who proposed to dismantle the tracks and sell the real estate. The court overruled the trustee, stating:

⁹ 90 Stat. 31, codified as amended in scattered sections of 45 and 49 U.S.C. (1976).

To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations. The ICC has in other instances imposed right of way preservation conditions even though the right of way was to be used eventually for a highway rather than a railroad.

Id. at 649-50 (citations omitted) (emphasis added). Thus, even before Congress explicitly enunciated railbanking as national policy, the ICC had exercised the authority to preclude abandonment to preserve transportation rights-of-way in the interest of "future public convenience and necessity." 49 U.S.C. § 10903(a).

In 1976, Congress clarified the ICC's abandonment authority to specifically address these preservation concerns.¹⁰ In the 4-R Act, Congress reaffirmed the concept of "railbanking," which was designed to preserve public railroad rights-of-way and thus to ensure that the national rail system would not be "so irreparably reduced in size that this energy and environmentally efficient mode would be incapable of meeting future transportation needs." S. Rep. No. 499, 94th Cong., 2d Sess. 43-44, reprinted in 1976 U.S. Code Cong. & Admin. News 14, 58. Section 809(c) of the 4-R Act, now codified at 49 U.S.C.

¹⁰ One of the goals of the 4-R Act was to "deregulate" railroad rate setting and to ease the burdens to railroads associated with maintaining rights-of-way. However, Congress realized that easing this burden—by making it easier for railroads to abandon unprofitable rights-of-way—would further exacerbate the alarming losses of rail corridors. Hence, Congress enacted the railbanking provisions discussed *infra*. S. Rep. No. 499, 94th Cong., 2d Sess. 2-8, 15, 43-44, reprinted in 1976 U.S. Code Cong. & Admin. News 14, 15-21, 29, 58.

§ 10906, specifically required the ICC to evaluate whether a rail line proposed for abandonment is suitable for use for other public purposes, "including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." If it is suitable, the line may be sold or leased only on conditions approved by the ICC. The ICC may prohibit the sale of the line for 180 days unless it has first been offered for sale on reasonable terms for public purposes. *Id.* Pursuant to the 4-R Act, the ICC on numerous occasions postponed abandonments to provide for conveyance of public rights-of-way in a manner that would allow preservation of the rights-of-way.¹¹ The Preseaults' claim that, prior to enactment of Section 1247(d), Congress was not concerned about the loss of public rights-of-way, simply is meritless.

2. Congress Enacted Section 1247(d) as a Reasonable Means of Preserving Rail Lines for Future Use.

Congress was, however, dissatisfied with the mechanism for preserving corridors established in the 4-R Act. This dissatisfaction resulted in two legislative enactments. First, Congress amended (as part of the Staggers Act in 1980) 49 U.S.C. § 10905 to provide for compulsory sale at "salvage value" of otherwise to-be-abandoned lines for continued trail use. Second, Congress adopted 16 U.S.C.

¹¹ See, e.g., *Boston & Maine Corp.—Abandonment Exemption*, 367 I.C.C. 688, 689-90 (1983) (ICC postpones abandonment for 90 days after concluding that the right-of-way is suitable for public use as a trolley); *Modern Handcraft, Inc.—Abandonment*, 363 I.C.C. 969, 971-73 (1981) (ICC prohibited abandonment for 180 days to provide transportation authority opportunity to acquire right-of-way for mass transit use); *Seaboard Coastline Ry.—Abandonment*, 360 I.C.C. 123, 135-37 (1979) (I.C.C., after finding right-of-way suitable for use as trail, conditioned abandonment for 180 days); *Illinois Central Gulf Ry.—Abandonment*, 354 I.C.C. 448, 455 (1977) (ICC conditions abandonment for 120 days to allow purchase of right-of-way for alternative public uses such as bike-way or addition to Shawnee National Forest).

§ 1247(d) to provide increased incentives for, and to aid in, the preservation of corridors for future rail use.¹²

In adopting Section 1247(d), Congress found that the 4-R Act had not been successful "in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes," in order to further Congress's goal "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." H.R. Rep. No. 28, 98th Cong., 1st Sess. 8, reprinted in 1983 U.S. Code Cong. & Admin. News 112, 119. Such a procedure was necessary to preserve the public's perpetual right-of-way and to prevent, by default, the loss of this public property.

Accordingly, Congress enacted Section 1247(d), which "ensure[s] that potential interim trail use will be considered prior to abandonment." *Id.* at 120. Congress expressed the railbanking purpose of Section 1247(d) on the face of the statute:

Consistent with the purposes of [the 4-R Act], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use . . . [interim trail use] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

16 U.S.C. § 1247(d) (emphasis added). Where Congress unambiguously expresses its intent regarding the precise question at issue, the Court must give effect to that intent. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984). Here, Congress could not express in any clearer terms its desire to foster the railbanking policies

¹² Section 1247(d) was derived in part from Section 809(a) of the 4-R Act, which required the Secretary of Transportation to study the feasibility of railbanking and interim uses.

of the 4-R Act as well as the conservation and recreation goals of the National Trails System Act.¹³ Section 1247(d) thus represents the logical culmination of Congress's efforts to ensure the continued existence of a national network of rail corridors which it has determined to be in the national interest.

The Preseaults' list of "items" allegedly demonstrating that railbanking is a "vapid rationalization," Pet. Br. at 39-40, ignores this chronology. It also ignores examples of both completed and proposed rejuvenation of rail service on lines over which service had previously been terminated.¹⁴ Moreover, the list is essentially a com-

¹³ Although resort to the legislative history is not necessary in this case because the statute is unambiguous, that history confirms that interim trail use serves the twin goals of maintaining the rail corridor while at the same time providing opportunities for recreational trails:

This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. This provision will assist recreation users by providing opportunities for trail use on an interim basis where such situation exists.

H.R. Rep. No. 28, 98th Cong., 1st Sess. 9, reprinted in 1983 U.S. Code Cong. & Admin. News 120.

¹⁴ See, e.g., *Montgomery County, Say Yes to Rails and Trails*, Wash. Post, Mar. 12, 1989, at D8. (proposal to link Washington area Metro stations by trolley over abandoned line provides attractive, cost-effective way to reduce traffic congestion); *Amtrak Takes A Chance on "Gambler's Express,"* Wash. Post, May 23, 1989, at B3 (new service to Atlantic City over abandoned line as an alternative to highway congestion and airport construction); *Daily Rail Service to Cape is Returning*, N.Y. Times, May 29, 1988, § 1 at 36, col. 4 (rail service providing access to Nantucket and Martha's Vineyard revived to alleviate congestion on Cape Cod highways).

Nor should the process of technological development be ignored. Long ago, this Court had the foresight to recognize that railroad regulation must accommodate and encourage technological innovation, and must evolve with the times. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9 (1877). A new cycle of technological

plaint that the ICC might have more effectively implemented the will of Congress¹⁵ or that Congress might have more artfully drafted the statute. Neither of these contentions, even if true, would invalidate Section 1247(d). As the district court in *Glosemeyer* found:

'[T]he effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment.' *Hodel*, 452 U.S. at 283, 101 S. Ct. at 2364. Here, as in *Hodel*, 'Congress considered the effectiveness of existing laws and concluded that additional measures were necessary to deal with the interstate commerce effects' of railroad abandonments. —*Hodel*, 452 U.S. at 283, 101 S. Ct. at 2364. It then responded, rationally, by enacting § 1247(d).

Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1118 (E.D. Mo. 1988), *aff'd*, No. 88-1863 (8th Cir., July 5, 1989). Section 1247(d) is therefore a valid exercise of Congress's authority under the Commerce Clause.

growth and innovation in the railroad industry is on the horizon even now. See *New Supertrains*, Newsweek, July 31, 1989, at 46; *Super-Trains in Our Future*, Focus, April 19, 1989, § 1 at 24.

¹⁵ The Preseaults call Section 1247(d) a sham because, they claim, "Before the ICC can even consider a 'rails-to-trails' conversion, it must find that the right-of-way is not necessary for '... present or future public convenience or [sic] necessity.'" Pet. Br. at 40 (emphasis in original). This argument is disingenuous because the finding of no "present or future" use is not required to provide for interim trail use pursuant to Section 1247(d), but rather to permit abandonment pursuant to the Transportation Act of 1920. 49 U.S.C. § 10903. Section 1247(d) provides only that interim trail use shall not be treated as an abandonment, and does not require the ICC to find that a right-of-way will not be put to rail use in the future. Indeed, Section 1247(d) evinces Congress's desire to provide a mechanism for future resumption of rail service. If, as the Preseaults allege, ICC procedures require the Commission to find that a right-of-way is not necessary for future public convenience and necessity prior to authorization of interim trail use, the Commission's procedures are inconsistent with the statute. The remedy is not to invalidate the statute, but to admonish the ICC to revise its procedures consistent with the statutory directives.

II. THE ICC'S CONTINUING EXERCISE OF AUTHORITY OVER A PUBLIC RIGHT-OF-WAY DOES NOT CONSTITUTE A TAKING.

The Preseaults' entire taking argument ignores the existing public property interest in the railroad right-of-way—a right for which the Preseaults' predecessors in interest were fully compensated. As a consequence, the Preseaults' argument is premised on a fallacy: that they have an interest in the property that somehow was “taken” by the ICC. In fact, however, no taking has occurred for four reasons. First, the Preseaults now hold precisely the same interest in the property that they and their predecessors have always held since the perpetual right-of-way was purchased in 1899: a valueless servient estate burdened by an exclusive and perpetual right-of-way. Second, the easement is subject to plenary ICC authority, and any impact on the servient estate as a result of ICC regulation of the easement cannot be considered a taking. Third, assuming *arguendo* that ICC regulation of rights-of-way can in some instances effect a taking of the servient estate, no such taking has occurred here because the regulation is related to rail purposes and because it results in a lesser burden on the servient estate than alternative means of achieving the same goal. Finally, no taking has occurred because the Preseaults cannot be said to have a reasonable investment-backed expectation in extinguishment of the easement.

A. There Was No Taking Because the Preseaults Retain the Same Property Interest They Had Before Interim Trail Use.

The Preseaults have not suffered a taking of any property because they have the same property interest that they and their predecessors in interest have always had, *viz.*, a fee interest subject to an easement. This servient interest was created when the easement was taken in 1899, and is essentially of no value because the easement is both perpetual and subject to exclusive use by the railroad, which forecloses the underlying fee owner from any use of the property. See 3 J. Sackman, Nichols on

Eminent Domain § 11.1[1].¹⁶ The Preseaults still retain that same valueless interest.

Any claim by the Preseaults that the easement has been extinguished and that they have an unencumbered title to the property is both meritless as a matter of law and precluded by the doctrine of collateral estoppel. Such a claim is meritless because the ICC historically has had the exclusive and plenary authority to regulate abandonments of rights-of-way, an authority which this Court has held to be critical to the congressional scheme of railroad regulation. *Kalo Brick*, 450 U.S. at 321. For this reason, while state law may be relevant to determining the nature of the right-of-way and of the servient interest, it only becomes relevant *after* the ICC authorizes an abandonment of the public right-of-way.¹⁷ *Louisiana &*

¹⁶ See also *New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898) (railroad easement has attributes of fee, including perpetuity and exclusive use and possession); *Harris v. Stevens*, 31 Vt. 79, 88 (1858) (exclusive possession and control of easement by railroad); *Jackson v. Rutland & Burlington R.R.*, 25 Vt. 150, 159 (1853) (same); *Smith v. Hall*, 103 Iowa 95, 72 N.W. 427, 428 (1887) (railroad a perpetual highway with fee being of little or no value; compensation given accordingly).

¹⁷ The existence of plenary ICC authority does not eliminate state law regarding reversion of public rights-of-way. Rather, state law simply does not come into play until the ICC withdraws federal law from the question by authorizing abandonment. *Hayfield N.R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984). See also *Hannick v. Kansas City S. Ry.*, 364 Mo. 883, 269 S.W.2d 646 (1951); *State by Wash. Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 548 (Minn.), *cert. denied*, 463 U.S. 1209 (1983) (“there is no merit to the argument that abandonment of the right-of-way occurred . . . when the ICC issued the abandonment certificate. The issuance of the ICC certificate of abandonment does not necessarily indicate an intention to abandon.”). Once the ICC has authorized abandonment and relinquished jurisdiction, state law then determines whether the line is abandoned for purposes of state property law. Indeed, a state may continue to regulate the right-of-way as long as it does not interfere with the federal scheme. There is thus no wholesale pre-emption of state law here such as this Court rejected in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1012 (1984).

Arkansas R.R. v. Bickham, 602 F. Supp. 383 (M.D. La.), *aff'd*, 775 F.2d 300 (5th Cir. 1985). See also *Kalo Brick*, 450 U.S. at 318-23; *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 166 (5th Cir. 1966). Until the ICC authorizes abandonment, the right-of-way remains subject to the ICC's authority and reversionary interest-holders have no right of reversion.¹⁸ *Trustees*, 496 A.2d at 153-54. Because the ICC has never authorized the State to abandon the public right-of-way at issue here, the Preseaults have never had the right to use or enjoy the property.¹⁹

Consequently, the Preseaults cannot claim that their property interests have been limited or invaded in any way, and the "physical invasion" cases—e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (imposition of public easement across howeowner's beachfront property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlord to allow placement of cable wires across private apartment building); and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government requirement of public access to formerly private marina)—are inapposite. In those cases, the property owners had the right to exclusive use

¹⁸ The five state cases cited by the Preseaults are distinguishable because in each of those cases the ICC had already authorized abandonment, allowing the state courts to determine whether the right-of-way was abandoned under state law. See *infra* p. 28. In this case, the Vermont Supreme Court correctly held that, because the ICC had not authorized abandonment, it had no authority to determine whether abandonment had occurred.

¹⁹ The claim that the easement has been extinguished is barred by the doctrine of collateral estoppel because, in litigation to which the Preseaults were parties, the Vermont Supreme Court held that the right-of-way had not been abandoned. *Trustees*, 496 A.2d at 153-54. Absent such abandonment, the easement is not extinguished and the Preseaults' fee interest remains subject to the public right-of-way. As a result, the Preseaults are estopped from asserting that they currently have the right to use and enjoyment of the right-of-way or that their property has been invaded. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171-72 (1984).

of the property prior to the action complained of; the property at issue had not previously been in the public domain. Here, the right to exclude others, which this Court has found to be an important aspect of property ownership, was conveyed to the easement holder by the Barker Estate in 1899, with full compensation being paid for that "stick" in the bundle of property rights. The Preseaults have not suffered the loss of this stick because it was never theirs to lose.²⁰

B. The ICC's Regulation of Easements Under the Commission's Jurisdiction Cannot Constitute a Taking of the Servient Estate.

At most, the Preseaults have had their future interest in unencumbered ownership of the property postponed, a result that, they allege, constitutes a taking of their servient estate.²¹ Pet. Br. at 17-19. Petitioners fail to recognize that Congress's exercise of the commerce power permits it to impose significant restrictions on private property. *Hodel v. Virginia Surface Min. and Reclamation Ass'n*, 452 U.S. at 276-77. Railroad regulation is a prime example of such a legitimate restriction. See *Kalo Brick*, 450 U.S. at 329. For this reason, this Court

²⁰ The D.C. Circuit's reasoning in *National Wildlife Federation v. Interstate Commerce Comm'n*, 850 F.2d 694, 705-06 (D.C. Cir. 1988), is flawed because of its misplaced reliance on these cases.

²¹ Petitioners argue that their "reversionary interest" has been effectively postponed, resulting in a temporary taking. See Pet. Br. at 18, n.16 citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). However, petitioners' passing reference to a "temporary taking" simply begs the question presented in the case at bar, namely, whether a taking, temporary or otherwise, has occurred. In *First English*, the Court held that the Fifth Amendment required compensation for a taking that was only temporary in nature; the taking itself was assumed. *Id.* at 314. Indeed, on remand the California Court of Appeals held that the ordinance at issue in *First English* did not effect a taking, temporary or otherwise. 258 Cal. Rptr. 893 (1989).

As demonstrated above, Section 1247(d) also does not effect a taking. The Preseaults' invocation of *First English* does not alter this outcome.

and others have held that ICC decisions postponing abandonment do not effect a taking of property. For instance, in the *New Haven Inclusion Cases*, 399 U.S. 392, 490-93 (1970), the ICC effectively denied a carrier's abandonment through liquidation and instead ordered the carrier to continue to provide service over particular lines until a suitable reorganization plan was approved. Ultimately, the ICC required the carrier to provide service for over seven years at substantial losses amounting to approximately 60 million dollars. *Id.* at 490. Nonetheless, the Court held that the ICC's order did not constitute a compensable taking. *Id.*

Similarly, in *Gibbons v. United States*, 660 F.2d 1227, 1234-39 (7th Cir. 1981), the ICC had delayed abandonment for over six months by issuing a directed service order pursuant to 49 U.S.C. § 11125(a) which required another rail carrier to provide service over a cashless railroad's lines in order to avoid a "wide array of economic and transportation dislocations." *Id.* at 1231. Under the order, the outside railroad was not required to pay rent to the cashless railroad for use of the railroad's lines and facilities unless the outside railroad produced a profit. The Seventh Circuit held that the ICC was well within its authority to delay abandonment approval until the ICC could assure that the public interest was protected and that the rent-free use of the cashless railroad's lines for approximately 240 days did not constitute a taking of the railroad's property. See also *Lehigh & New England Ry. v. Interstate Commerce Comm'n*, 540 F.2d 71, 83 (3rd Cir. 1976) (also upholding uncompensated directed service orders against takings challenges).

Thus, despite adverse impacts on property interests, ICC regulation of railroad rights-of-way—even if such regulation postpones abandonment—does not result in a taking of property. This is so because regulatory actions affecting dominant estates in which the public has a substantial interest—such as railroad rights-of-way—

do not constitute a taking of servient estates that are affected by such regulation.²²

Even assuming, *arguendo*, that federal regulation of public rights-of-way could in some instances constitute a taking of servient estates, Section 1247(d) does not do so because it furthers railroad purposes and imposes a lesser burden on the servient estate than other alternatives. That Section 1247(d) furthers rail purposes cannot reasonably be disputed; one of its stated purposes is to preserve public rights-of-way for future rail use.²³ Because regulation of railroad abandonments is a legitimate exercise of Congress's authority under the Commerce Clause, ICC actions that further railroad purposes cannot be considered a taking. See *New Haven Inclusion Cases*, 399 U.S. at 492. That Section 1247(d) puts the

²² This principle is demonstrated by this Court's decisions concerning federal regulation of another type of public right-of-way, *viz.*, navigable waterways. As this Court has held, the Commerce Clause gives the federal government a dominant servitude with respect to navigable waters "which extends to the entire stream and the stream bed below the ordinary high-water mark." *United States v. Rands*, 389 U.S. 121, 123 (1967). This Court has consistently held that government actions which are directed at this dominant servitude do not effect a taking even though the government action may result in a significant adverse impact on private property interests associated with or adjacent to the water. *Id.* (damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from lawful exercise of power to which the interests of riparian owners have always been subject); *United States v. Cherokee Nation of Oklahoma*, 486 U.S. 700 (1987). See also *United States v. Commodore Park*, 324 U.S. 386 (1945).

Similarly, federal regulation of land-based transportation rights-of-way cannot constitute a taking of the servient estate. Any impact that regulation of the government's right-of-way has on the Preseaults' interest is incidental to Congress's lawful exercise of power over railroads to which reversionary interests have always been subject, and therefore does not rise to the level of a taking.

²³ Regulation in the interest of future rail use is no less legitimate as railroad regulation simply because the use is not current. See *Reed v. Meserve*, 487 F.2d at 649-50.

right-of-way to efficient use during the interim between prior and future railroad use does not detract from the Act's legitimate rail purposes. *Glosemeyer*, slip op. at 12-14; *Preseault*, 853 F.2d at 150.

Moreover, the means chosen by Congress to preserve railroad rights-of-way are less burdensome to the fee owner than continuation of rail use. It is undisputed that Congress could require a railroad to continue operating over a right-of-way or could authorize construction of a highway thereon simply to preserve the right-of-way. See *supra* p. 11. If Congress could accomplish its goal through such means without working a taking, "it would be strange to conclude that providing [a less drastic] alternative . . . which accomplishes the same purpose" results in a taking. *Nollan*, 483 U.S. at 836-37.²⁴

Indeed, a conclusion to the contrary here would cast substantial doubt on the constitutionality of more intrusive means of preserving rights-of-way which the ICC

²⁴ The burden on interstate commerce resulting from trail use is less than would result from either requiring a railroad to maintain minimal activity on the rail line to preserve its rail use or from letting the right-of-way remain inactive in the hands of the railroad. The trail manager assumes the burden of all taxes and other costs of maintaining the right-of-way, thereby relieving the railroad of this financial burden while preserving the right-of-way for future use. 16 U.S.C. § 1247(d).

Trail use also results in a lesser intrusion on adjacent property owners. Railroad rights-of-way have always been recognized as a uniquely intrusive form of easement, allowing the abutting landowner essentially no use of the land over which the right-of-way runs. See *supra* pp. 16-17. Indeed, it was this intrusiveness which led to compensation of the property owner as if a fee interest was taken. A trail does not share this characteristic of exclusivity; it allows the property owner some use of the land. Moreover, the ICC has found no evidence of environmental, aesthetic or safety problems on rights-of-way which have been converted to trail use pursuant to Section 1247(d). See generally *Rail Abandonments—Use of Rights-of-Way As Trails—Supplemental Trails Act Procedures* (unpublished) ICC Ex Parte No. 274 (Sub. no. 13) (May 18, 1989).

has historically used. It would call into question all prior ICC decisions to delay abandonments,²⁵ would severely undermine the ICC's ability to regulate abandonments, and would undermine the 4-R Act as well as Section 1247(d). Any time a state law allegedly is inconsistent with federal law, parties could assert that the state law gave them a property interest that was "taken" by an ICC decision either to approve (as in *Kalo Brick*) or disapprove (as in this action) an abandonment. Simply put, finding that the Preseaults' property has been taken here would effectively deny the public's right to retain transportation rights-of-way and would constrict, if not destroy, the ICC's ability to regulate abandonment. The Fifth Amendment cannot and does not compel this result.

C. The Preseaults Have No Reasonable Investment-Backed Expectation of Reversion.

As this Court held in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), for a legitimate governmental regulatory program to work a taking it must "interfere[] with reasonable investment-backed expectations." See also *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124-25 (1978). Because, as demonstrated above, Section 1247(d) represents a legitimate regulatory program, and because, as a matter of both federal and state law, the Preseaults do not have a reasonable investment-backed expectation in extinguishment of the easement, there has been no taking here.

²⁵ In *National Wildlife*, the court attempted to distinguish prior ICC decisions delaying abandonment on the grounds that the postponement of abandonment was temporary (e.g., only 7 years in *New Haven Inclusion Cases*) rather than permanent. 850 F.2d at 708. This distinction is legally irrelevant. *First English*, 482 U.S. 304 (temporary takings no different than permanent takings). Prior ICC decisions delaying abandonment were not takings because such decisions constituted appropriate regulatory actions within the ICC's authority, not because they were temporary.

1. Under Federal Law, the Preseaults Do Not Have a Reasonable Expectation of Extinguishment of the Easement.

As a matter of federal law, the Preseaults could not have a reasonable expectation of extinguishment of the right-of-way. As discussed *supra* p. 4, the right-of-way has always been subject to the ICC's plenary authority. Federal law thus circumscribed the servient estate at its inception, tempering any expectations of extinguishment. In 1920 the ICC was given plenary authority over abandonments. Since that time, the ICC has had the authority to require continued railroad operation over a given right-of-way, thereby preventing abandonment. At a minimum, anyone who acquired a reversionary interest in a railroad right-of-way after 1920 could not have had a reasonable expectation of abandonment absent ICC authorization. The passage of the 4-R Act further reinforced this lack of reasonable expectation of abandonment for those, like the Preseaults, who purchased servient estates after 1976.

Thus, the Preseaults, who acquired the adjacent land and servient estate in 1980, could not have had a reasonable expectation under federal law that the ICC would authorize abandonment of the right-of-way. When they purchased the land with a railroad right-of-way clearly delineated on the title, the Preseaults "assumed the risk that . . . the interests of the public would be considered as well as theirs." *New Haven Inclusion Cases*, 399 U.S. at 492. The statutes relating to ICC regulation of abandonment put the Preseaults on notice as to the ICC's plenary authority over abandonments and its ability to require railbanking and to postpone abandonment indefinitely. *Cf. Monsanto*, 467 U.S. at 1006 (Monsanto on notice of EPA authority to use pesticide data). Given that railroad rights-of-way "long ha[ve] been the focus of great public concern and significant government regulation," the Preseaults were on notice that "the possibility was substantial that the Federal Government . . . would find [refusal to authorize aban-

donment of the right-of-way] to be in the public interest." *Id.* at 1008-09. "[A]bsent an express promise" by the ICC that it would declare the line abandoned under a specified set of conditions, the Preseaults "had no reasonable investment-backed expectation" that the right-of-way would be extinguished. *Id.* at 1008. There has been no taking of the Preseaults' property.

2. Under Vermont Law, the Preseaults Do Not Have a Reasonable Expectation of Extinguishment of the Easement.

As noted *supra* p. 3, the Rutland-Canadian condemned the land at issue here and obtained a "perpetual" right-of-way to operate a railroad. Because perpetual operation of the railroad deprived the Preseaults' predecessors in interest of any value in the land, they were compensated as if the property were taken "in fee simple." 4 J. Sackman, *Nichols on Eminent Domain* § 12.41[2].²⁶ Thus, at the time of condemnation, there was no reasonable expectation that the right-of-way would be extinguished.

Moreover, at the time of condemnation the public right-of-way was not limited to railroad use. Rather, as the Rutland-Canadian's charter authorizing the condemnation provides, the right-of-way is "subject to the provisions of the general law," 1898 Vt. Acts No. 160, § 2, and is "under the control of the legislature to amend or repeal as the public good may require." *Id.* § 10. Thus, at the time of the condemnation, there was no reasonable expectation that the right-of-way would be extinguished

²⁶ See, e.g., *Chicago Mill & Lumber Co. v. Board of Directors*, 236 Ark. 322, 366 S.W.2d 184, 185 (1963); *Brown v. Title Guaranty & Surety Co.*, 232 Pa. 337, 81 A. 410, 411 (Pa. 1911) (no allowance made for any reversionary interest in compensating owner because fee is "absolutely worthless"); *Smith v. Hall*, 72 N.W. at 428. Although there can be disputes over whether a fee simple, a fee simple determinable, or an easement was acquired, there can be no dispute that the original landowners were compensated as if the railroads were taking a fee simple interest. Thus, petitioners are now seeking a second compensation for the same property interest.

even after railroad use ended. Pursuant to the condemnation itself, Congress or the Vermont state legislature was free to provide another use for this public right-of-way.

Even before 1981, when Vermont enacted legislation further codifying the public character of such rights-of-way,²⁷ Vermont courts had found that railroad easements are easements for public highway purposes. See *White River Turnpike Co. v. Vermont Central R.R.*, 21 Vt. 590, 594 (1849) (railroad is an "improved highway" and property taken for railroad use "is property taken for the public use, as much as if taken for any other highway"); *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 352, 318 A.2d 652, 653 (1974) ("It has long been the law of this State . . . that a railroad is an improved highway."). Vermont courts have indicated that use of a railroad right-of-way is not confined to simply running a train up and down a track, but encompasses many other uses.²⁸ See, e.g., *Proctor v. Central Vermont Public Service Corp.*, 116 Vt. 431, 433-34, 77 A.2d 828, 830 (1951) (railroad use encompassed other uses, including utility lines); *Lamoille Grain Co. v. St. Johnsbury and Lamoille County R.R.*, 135 Vt. 5, 369 A.2d 1389 (1976) (use of right-of-way for grain storage). See

²⁷ Vt. Stat. Ann. Tit. 30, § 711 (1986) states:

[W]hen railroad operations cease on railroad rights-of-way owned by the state or municipality the title or interest held by the state or municipality in such rights-of-way shall be retained in the state or municipality for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes.

²⁸ In their brief, the Preseaults simply beg a critical question in this case. They claim that "Once railroad use ends, the railroad's interest in the property ends, and the underlying fee owner has unencumbered, fee simple absolute, title." Pet. Br. at 15. The issue in this case, however, is not "what happens when railroad use ends," but rather, "when does railroad use end?" Under Vermont law, railroad use is synonymous with public highway use and does not end as long as the property is being used as a public highway.

also *West v. Bancroft*, 32 Vt. 367, 371 (1859) (public authority over highways not confined to use for sole purpose of travel; reservoir on highway right-of-way not a taking); *Brainard v. Missisquoi R.R.*, 48 Vt. 107 (1875) (conversion of plank road to railroad not a taking because plank road had not been abandoned); *Whitcomb v. Town of Springfield*, 123 Vt. 395, 189 A.2d 550 (1963) (conversion of town road to trail found to be not a taking since public use had not ended and easement was not extinguished.) Vermont is thus in accord with most states in considering railroads as public highways, and railroad use as embodying a wider concept of general highway use.²⁹

Use of the right-of-way for trail purposes is therefore consistent with the nature of the right-of-way. The right-of-way continues to be used as a public way for public transportation purposes, providing access to and along Lake Champlain for pedestrians and cyclists. Any expectation by the Preseaults that public trail use would be outside the ambit of the right-of-way and would result in its extinguishment is unreasonable.

Citing five state cases, the Preseaults disingenuously claim that "the facts at bench demonstrate that there can be no transfer of the former right-of-way for trail use." Pet. Br. at 16 (emphasis added). The Preseaults' logic is circuitous and the cases cited³⁰ are inapposite. If the

²⁹ See, e.g., *State ex rel. Fogle v. Richley*, 55 Ohio St. 2d 142, 378 N.E.2d 472 (1978) (conversion of railroad to public highway not a taking because still a public transportation use); *Faus v. City of Los Angeles*, 67 Cal. 2d 350, 431 P.2d 849, 62 Cal. Rptr. 193 (1967) (electric railroad to buses); *Bernards v. Link*, 199 Or. 579, 248 P.2d 341 (1952), *aff'd on rehearing*, 200 Or. 205, 263 P.2d 794 (1953) (railroad to logging road); *Kansas Electric Power Co. v. Walker*, 142 Kan. 808, 51 P.2d 1002 (1935) (electric railroad to buses).

³⁰ *Pollnow v. State Dept. of Natural Resources*, 88 Wis. 2d 350, 276 N.W.2d 738 (1979); *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 428 N.E.2d 671 (1981); *McKinley v. Waterloo R. R.*, 368 N.W.2d 131 (Iowa 1985); *Lawson v. State*, 107 Wash. 2d 444, 730 P.2d 1308 (1986); and *State by Washington Wildlife Preserva-*

right-of-way is "former," as alleged by the Preseaults, it has already been abandoned. In fact, all five state cases cited by the Preseaults dealt with situations where the ICC had authorized abandonment of the right-of-way before trail groups received purported title.³¹ In such a situation it is possible,³² but by no means certain,³³ that the easement would be extinguished and a second condemnation would be necessary. Where, as here, the ICC has not authorized abandonment, there has been and can be no extinguishment of the easement, *Trustees*, 456 A.2d at 153-54, and thus the easement is not a "former" right-of-way. Moreover, all of the cited cases dealt with state rails-to-trails statutes. None dealt with Section 1247(d). The overriding federal interest in advancing national transportation policies through rail-banking distinguishes these cases from the one at bar.³⁴

One case, *Washington Wildlife*, actually upheld a rails-to-trails conversion. Petitioners attempt to distinguish *Washington Wildlife* by arguing that "the deeds by which the easement was created did not limit the use of the easement to railroad purposes." Pet. Br. at 17 (emphasis in original). However, as demonstrated above, the right-of-way here is similar to the easement in *Washington Wild-*

tion, Inc. v. State, 329 N.W.2d 543 (Minn.), cert. denied, 463 U.S. 1209 (1983).

³¹ *Pollnow*, 276 N.W.2d at 740; *Chicago, Aurora & Elgin R.R. Abandonment*, 312 I.C.C. 533 (1961) (ICC authorization of abandonment of line at issue in *Schnabel*); *McKinley*, 368 N.W.2d at 133; *Lawson*, 730 P.2d at 1310; *Wash. Wildlife*, 329 N.W.2d at 544.

³² See *Pollnow*, 276 N.W.2d at 744; *Schnabel*, 428 N.E.2d at 677; *McKinley*, 368 N.W.2d at 133; *Lawson*, 730 P.2d at 1311.

³³ See *Wash. Wildlife*, 329 N.W.2d at 545.

³⁴ The *Pollnow* court was aware it was deciding a different question than the one presented in this case: "We make no holding as to the power of the Congress or the state Legislature to preserve the rights of the public in existing rail corridors for multiple public uses, including transportation, conservation, or recreation. . . . We [confine our holding to] the facts of this case." 276 N.W.2d at 746.

life. As that court held: "Use of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates." 329 N.W.2d at 545. See also *Rieger v. Penn Central Corp.*, No. 85-CA-11 (Oh. App., May 21, 1985) (conveyance of right-of-way for trail use does not constitute abandonment of right-of-way for public travel).

Accordingly, under Vermont law, the Preseaults had no reasonable investment-backed expectation that the easement would be extinguished. They should have expected Vermont—the holder of the public right-of-way—to make further use of the right-of-way, consistent with state and federal law. This is precisely what happened here.

In sum, petitioners have suffered no taking of their property because the right-of-way was never extinguished, nor could they reasonably have expected it would be.

CONCLUSION

Section 1247(d) represents a legitimate exercise of Congressional authority under the Commerce Clause to regulate railroad rights-of-way in the public interest and does not result in a taking of petitioners' property. The Second Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

[390]

KNOW ALL MEN BY THESE PRESENTS

That we, WILLIAM M. O'BRIEN and VIRGINIA ANN O'BRIEN, husband and wife, of Burlington, County of Chittenden and State of Vermont; and DENTON EDWARD MacCARTY and MARY IRELAND MacCARTY, husband and wife, of Concord in the County of Middlesex and State of Massachusetts Grantors, in the consideration of Ten and more Dollars paid to our full satisfaction by J. PAUL PRESEAULT and PATRICIA A. PRESEAULT, husband and wife, of Burlington in the County of Chittenden and State of Vermont Grantees, by these presents, do freely Give, Grant, Sell, Convey and Confirm unto the said Grantees, J. PAUL PRESEAULT and PATRICIA A. PRESEAULT, husband and wife, and their heirs and assigns forever, a certain piece of land in Burlington in the County of Chittenden and State of Vermont, described as follows, viz: Two vacant parcels of land, one situated at the westerly end of Killarney Drive and the other westerly thereof and situated on the shore of Lake Champlain and being all and the same land and premises conveyed by John J. and Teresa E. Ireland by Warranty Deeds, one to William M. O'Brien and Virginia Ann O'Brien, husband and wife, dated July 6, 1977 and of record in Volume 246, Page 307 of the City of Burlington Land Records and the other to Denton Edward MacCarty and Mary Ireland MacCarty, dated July 7, 1977 which is of record in Volume 246, Page 306 of said land records, each deed conveying an undivided one-half interest in land described therein as follows: "A parcel of land in the vicinity of Killarney Drive, having 215 feet, more or less, on the shores of Lake Champlain; being bound on the west by Lake Champlain, on the east by the railroad, on the south by land now or formerly of Detore, on the north by land now or formerly owned by Preseault, together with a strip of land

50 feet in width at the end of Killarney Drive, from the end of Cul-de-Sac to the rail and right of way.

And being a portion of the land conveyed to John J. Ireland and Teresa E. Ireland, husband and wife, by deed of the Chittenden Trust Co. as Executor of the Estate of Emma B. Lambkin, dated June 30, 1945, and recorded on Page 486, of Volume 120 of the Land Records of the City of Burlington, to which deed, its record, and reference is contained therein and their respective records, reference is hereby had in aid of this description."

The land above described is conveyed herein subject to all easements and rights of way of record. Said parcels of land [391] are also shown on a survey plat entitled, "Plat of Survey for Denton E. and Mary E. MacCarty and W. Michael and Virginia A. O'Brien, Killarney Drive, Burlington, Vermont," prepared and surveyed by Green Mountain Surveys, Inc., Essex Junction, Vermont, dated December 21, 1979, to which reference is made in aid of this description, but to which boundaries no warranties whatsoever are made by the herein grantors, their heirs or assigns.

Reference is hereby made in and to said deed and deeds and the references therein in further aid of this description.

Said survey plat is of record in Plat Book 2, Page 18 of the City of Burlington Land Records.

Included in this conveyance are any rights reverting to the owners of the parcels conveyed through the abandonment of the railroad right of way.

To have and to hold *said granted premises, with all the privileges and appurtenances thereof, to the said Grantees, J. PAUL PRESEAULT and PATRICIA A. PRESEAULT, husband and wife, and their heirs and assigns, to their own use and behoof forever; And we the said Grantors, WILLIAM M. O'BRIEN, VIRGINIA ANN O'BRIEN, DENTON E. MacCARTY and MARY*

IRELAND MacCarty, for ourselves and our heirs, executors and administrators, do covenant with the said Grantees, J. PAUL PRESEAULT and PATRICIA A. PRESEAULT, and their heirs and assigns that until the *ensealing of the presents* we are the sole owners of the premises, and have good right and title to convey the same in manner aforesaid, that they are Free from every encumbrance; except as above stated and except current real estate taxes thereon which are to be prorated as of the date of delivery of this deed; and we do [392] *hereby engage to Warrant and Defend the same against all lawful claims whatever, except as above stated.*

In Witness Whereof, we *hereunto set our hands and seals this 15th day of July A.D. 1980*

In Presence of

/s/ James S. Howard	/s/ Denton E. MacCarty DENTON E. MACCARTY	[SEAL]
---------------------	--	--------

/s/ Margaret A. Dowd (as to DEM & MIM)	/s/ Mary Ireland MacCarty MARY IRELAND MACCARTY	[SEAL]
---	--	--------

/s/ Allen F. Gear	/s/ William M. O'Brien WILLIAM M. O'BRIEN	[SEAL]
-------------------	--	--------

/s/ John P. Maley (as to WMO & VAO)	/s/ Virginia Ann O'Brien VIRGINIA ANN O'BRIEN	[SEAL]
--	--	--------

4a

STATE OF VERMONT)
) ss.
CHITTENDEN COUNTY)

At Burlington this 18th day of July A.D. 1980

*William M. O'Brien and Virginia Ann O'Brien
personally appeared, and they acknowledged this instru-
ment, by them sealed and subscribed, to be their free act
and deed.*

*Before me /s/ Allen F. Gear
Notary Public*

STATE OF MASSACHUSETTS
MIDDLESEX COUNTY, ss.

*At Concord, this 15 day of July, 1980, Denton E.
MacCarty and Mary Ireland MacCarty, personally ap-
peared, and they acknowledged this instrument, by them
sealed and subscribed, to be their free act and deed.*

[SEAL]

*Before me /s/ James S. Howard
Notary Public*

*Received for record July 18, 1980, at 12:05 P.M. and
recorded.*

Attest:

*/s/ F.L. Wagner
City Clerk*

AMICUS CURIAE

BRIEF

(18)
No. 88-1076

Supreme Court, U.S.
FILED
JUL 29 1989
JOSEPH E. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

J. PAUL PRESEAUT and PATRICIA PRESEAUT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, STATE OF VERMONT,
CITY OF BURLINGTON and VERMONT RAILWAY, INC.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF MONTGOMERY COUNTY, MARYLAND
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS

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**BRIEF OF MONTGOMERY COUNTY, MARYLAND
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

This *amicus curiae* brief in support of respondents is presented on behalf of Montgomery County, a political subdivision of the State of Maryland (hereinafter referred to as "Montgomery County"), by, *inter alia*, its authorized legal officer.¹

INTEREST OF AMICUS

Montgomery County opposes petitioners' challenge to the constitutionality of Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) (the "Trails Act"), and seeks affirmation of the Second Circuit's decision below, *Preseault v. Interstate Commerce Commission*, 853 F.2d 145 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 1929 (1989) ("*Preseault*"). Montgomery County has a compelling interest in the validity of Section 8(d). In December of 1988, the county spent \$10.5 million to acquire 6.4 miles of rail corridor from CSX Transportation, Inc. ("CSX") pursuant to Section 8(d).

The acquired corridor, which CSX initially had sought approval of the Interstate Commerce Commission ("ICC") to abandon, formerly was part of a CSX freight line known as the Georgetown Branch, which extended from Silver Spring, Maryland to the Georgetown waterfront in the District of Columbia.² The Maryland segment acquired by Montgomery County is the last undeveloped east-west corridor in the county's heavily urbanized and congested southern portion, which adjoins the District of Columbia. The corridor consists of rights-of-way acquired by predecessors of CSX through a

¹ Under Rule 36.4 of the Rules of the Supreme Court of the United States, Montgomery County need not obtain the consent of the parties to file this *amicus curiae* brief because it is a political subdivision of a state.

² Georgetown Branch Corridor Study, Montgomery County Department of Transportation (May 1989); Washington Post, July 15, 1989, page E1.

mix of fee simple purchases, voluntary easements and easements by condemnation, generally between the years 1890 and 1910.

Having successfully utilized Section 8(d) to forestall abandonment of this rail corridor, Montgomery County is dedicated to preserving it for future public benefit. Initially, the county plans to use the entire corridor for recreational trails, while a portion of the corridor also would be used for a light rail mass transit system. The trails would be fully compatible with the light rail system and would coexist with it. The light rail system is projected to transport approximately 13,000 people per day by 1995, and would extend between two of the county's major business districts, Bethesda and Silver Spring. Not only would intracounty transportation necessarily improve, but also interstate transportation would be facilitated by direct connections to the Washington, D.C. metropolitan area subway system at each end of the light rail line.³ Indeed, approximately 23 percent of the projected passengers would be District of Columbia residents.⁴ Thus, the county's plan for light rail transit service will preserve rail use on the right-of-way, will create extensive recreational opportunities along a trail system paralleling the light rail line, and is consistent with future reactivation of freight rail service over the same right-of-way.

Montgomery County's reliance on the Trails Act, moreover, underscores its utility. Although petitioners claim that the avowed rail corridor preservation purposes of Section 8(d) are a mere "sham" (Pet. Br. at 40), the county's experience belies that contention. The county's ongoing efforts show how the statute can be used by local government to meet its residents' current as well as future transportation needs. The county has secured pledges of more than \$70

³ The subway system is operated under the Washington Metropolitan Area Transit Authority Compact among Maryland, Virginia and the District of Columbia. The compact was assented to by Congress in Pub. L. 89-774, 80 Stat. 1324 (1966), and is codified at D.C. Code § 1-2431.

⁴ East-West Transitway Feasibility Study, Metropolitan Washington Council of Governments, prepared by Richard H. Pratt and Lea, Elliot and McGean (April 1986).

million from the State of Maryland and is committing millions of dollars of its own funds to create the light rail line and the parallel system of hiking and biking trails.⁵

But, state funds are available only if the county provides the rail right-of-way in a timely manner. If the county's title were undermined or clouded, its ability to timely provide the right-of-way would be seriously hampered if not entirely frustrated.

Although it is Montgomery County's position that its acquisition of the right-of-way for light rail transit use prevented reversion of the easements to the grantors under Maryland law, the Maryland case law on this point is sparse.⁶ Absent Section 8(d), therefore, the county's investment in rail and railbanking uses could be threatened by title litigation. Section 8(d) provides the county with the title needed to timely provide the right-of-way for the transit system. This Court's decision as to the constitutionality of that statute accordingly will be of great significance to the county and its residents, because an adverse ruling will undercut the county's ability to timely provide the right-of-way. Indeed, an adverse ruling will impair the ability of all state and local governments to use the Trails Act for future transportation needs as Montgomery County properly has done.

Montgomery County's substantial reliance on the certainty and uniformity provided by the Trails Act in advancing its light rail transit system compels its participation in this case. The county urges the Court to uphold the judgment of the Second Circuit below.

SUMMARY OF ARGUMENT

Petitioners challenge the validity of Section 8(d) of the Trails Act under both the Takings Clause and the Commerce Clause. The Second Circuit below, however, correctly decided that ICC action under Section 8(d) does not effect a taking

⁵ Washington Post, May 16, 1989, page B1.

⁶ See *Anne Arundel County v. Baltimore & A.R.R.*, 416 A.2d 777 (Md. App. 1980).

and, further, that the enactment of Section 8(d) falls within congressional lawmaking power under the Commerce Clause.

As to the taking issue, the Second Circuit properly determined that ICC action under Section 8(d) could not effect a taking of petitioners' reversionary interest. Because state property law operates subject to the ICC's plenary and exclusive authority over railroad abandonments, petitioners' interest in the unencumbered possession of the right-of-way cannot vest while, as here, the ICC's jurisdiction over the railroad right-of-way is continuing. Reversion can only occur after the ICC has issued an unconditional certificate of abandonment and loses jurisdiction, and even then state property law would have to examine the surrounding circumstances to determine whether the carrier actually has exercised the authorized abandonment. Here, because no abandonment certificate has been issued in the first place, there could be no abandonment that would trigger reversion, and thus there has been no change in petitioners' property rights which could form the basis for a taking.

Importantly, the ICC's action under Section 8(d) here does not alter or modify petitioners' legitimate expectations under state property law. Rather, because of the nature of the underlying easement as a railroad right-of-way, state property law takes the position that the parties to the easement intended or understood from its creation that it would be controlled in part by regulatory authorities acting in the public interest. As a result, any legitimate regulation—such as ICC action under Section 8(d)—is considered to be consistent with the terms of the easement. From the perspective of state property law, therefore, it is clear that petitioners' property rights are not being displaced by the ICC's action, and accordingly no taking has occurred.

Even if this Court were to conclude that a taking somehow could have occurred in this particular case, it should avoid a sweeping ruling that could be applicable to every Trails Act acquisition of a rail corridor comprised of easements in whole or in part. *Amicus* Montgomery County

submits that there cannot be a taking where future rail use of a Trails Act corridor is reasonably projected, as is true of the corridor the county has acquired.

Petitioners' Commerce Clause argument, meanwhile, is wholly without merit. Every court that has addressed the issue has held that Section 8(d) plainly is a valid exercise of Congress's power under the Commerce Clause. Petitioners' desperate attempt to gain support for their argument from *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), is futile. That case addresses only the validity of a state police powers regulation under the Takings Clause and does not even consider the entirely separate question of congressional lawmaking power under the Commerce Clause.

ARGUMENT

I. Section 8(d) Of The Trails Act Does Not Effect A Taking Within The Meaning Of The Fifth Amendment.

The Second Circuit correctly held that in this case Section 8(d) of the Trails Act does not enable the ICC to effect a taking of private property within the meaning of the Fifth Amendment.⁷ While the Second Circuit's explanation of its holding may have been terse, its holding nevertheless is well-founded.

A. The Second Circuit Properly Determined That Petitioners' Property Had Not Been Taken.

The private property supposedly taken here is petitioners' alleged reversionary interest in a railroad right-of-way in the State of Vermont. Petitioners claim to hold title to the land underlying the right-of-way, subject to an easement for rail-

⁷ See U.S. Const. Amend. V ("[N]or shall private property be taken for public use, without just compensation."). Petitioners do not challenge the ICC's action on the basis that it violates the "public use" requirement of the Takings Clause; indeed, the ICC's action clearly has the requisite public purpose. See *Preseault*, 853 F.2d at 150-51. Rather, petitioners only argue that their property has been taken without just compensation.

road purposes only.⁸ Petitioners also claim that, under this type of easement, Vermont law would cause reversion to them of unencumbered title to the land when the railroad use is abandoned.

Petitioners argue that Section 8(d), "by permitting the ICC to issue a Certificate of Interim Trail Use to a carrier that has discontinued service and not to issue a Certificate of Abandonment, enables the ICC to 'take' their property." *Preseault*, 853 F.2d at 151. This action effected a taking, according to petitioners, "by indefinitely postponing the reversion of an interest that would otherwise vest under state law." *Id.*

In rejecting this argument below, the Second Circuit first reviewed the interplay between ICC regulation and state property law. It then properly concluded that "no reversionary interest can or would vest" and therefore no taking had occurred. *Id.*

As the Second Circuit points out, state property law "generally determines what interest is retained by a property owner whose land is subject to a railroad right-of-way." *Preseault*, 853 F.2d at 150 (citing, *inter alia*, *National Wildlife Federation v. Interstate Commerce Commission*, 850 F.2d 694, 703 (D.C. Cir. 1988) ("*National Wildlife Federation*"). State property law also determines whether abandonment or some other circumstance "may trigger a reversion." *Id.* at 150.

However, on the issue of abandonment, state property law operates subject to the ICC's plenary and exclusive authority to regulate railroad abandonments. As a result, abandonment

⁸ Railroad rights-of-way generally were created by voluntary conveyance or condemnation, and the railroads hold their interests in the rights-of-way in a variety of forms, which range from fee simple interests to more limited interests such as the fee simple determinable and the easement. See generally *National Wildlife Federation v. Interstate Commerce Commission*, 850 F.2d 694, 703 (D.C. Cir. 1988); *Schnabel v. County of DuPage*, 428 N.E.2d 671, 676 (Ill. App. 1981). In this case, petitioners claim that the easement at issue originally was created in 1899 by condemnation. Many of the easements involved in *amicus* Montgomery County's case similarly were created by condemnation.

of a railroad right-of-way cannot occur under Vermont or any other state property law until the ICC issues, and the railroad exercises, a valid and unconditional certificate of abandonment.⁹ *Louisiana & A. Ry. v. Bickham*, 602 F. Supp. 383, 384 (M.D. La.), *aff'd without op.*, 775 F.2d 300 (5th Cir. 1985). *Accord, Preseault*, 853 F.2d at 150 (citing, *inter alia*, *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981)); *National Wildlife Federation*, 850 F.2d at 704; *Trustees of Diocese of Vermont v. State*, 496 A.2d 151, 153-34 (Vt. 1985). See *Hayfield N.R.R. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 633-34 (1984). Prior to the issuance of such a certificate, the ICC's jurisdiction over the right-of-way continues, and any legitimate regulation of the right-of-way by the ICC pre-empts state law to the contrary, whether property law or some other type of state law.¹⁰ *National Wildlife Federation*, 850 F.2d at 703-04. See *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 317-19, 324-332; *Preseault*, 853 F.2d at 150.

Once the ICC's abandonment certificate has been issued and exercised, state property law will determine whether the right-of-way, in fact, has been abandoned. If the appropriate circumstances are present, at that point the "right-of-way may be . . . extinguished." *National Wildlife Federation*, 850 F.2d at 704. *Accord, Preseault*, 853 F.2d at 150.

⁹ The ICC's power to regulate abandonments by rail carriers arises from the Transportation Act of 1920, ch. 91, 41 Stat. 477-78, which added a new Section 1(18) to the Interstate Commerce Act, later recodified at 49 U.S.C. § 10903(a). Section 1(18) provided in pertinent part:

[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

¹⁰ The Second Circuit explained below that the "ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest." *Preseault*, 853 F.2d at 151.

In recognition of the role of regulation, when a railroad easement, as here, is created by condemnation, it generally is treated as a permanent occupation of the right-of-way by the railroad. Accordingly, compensation equal to the full market value of the underlying land usually is paid. See 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.41[2] (Rev. 3d ed. 1985).

More importantly, state courts interpreting voluntary railroad easements have held that, at the time of the creation of the easement, the parties intended, or at least are presumed to have intended, that the duration of the easement would be controlled not only by the railroad's predilections, but also by regulatory authorities looking out for the public interest.¹¹ This principle recently was enunciated by the Supreme Court of Appeals of West Virginia in *Marthens v. Baltimore & Ohio Railroad*, 239 S.E.2d 706 (W. Va. 1982), a case involving the possible reversion of a railroad right-of-way. The court first referenced the status of railroads as "publicly regulated common carriers" whose rights and obligations are "determined by constant consultation with the public interest." *Id.* at 711. Then, quoting *Atlanta & West Point Railroad v. Camp*, 60 S.E. 177, 179 (Ga. 1908), it said:

[When] one contracts with a railroad company in reference to those matters where the public is involved, the contract is made subject to the rights of the public and when the exigencies of the business of the company are such that the rights of the public come in conflict with the rights of the contracting party under his contract, it is to be presumed that it was the intention of the parties that the private rights under the contract should yield to the public rights.

289 S.E.2d at 711 (emphasis added). Accord, *Louisville & N.R.R. v. Hammer*, 236 S.W.2d 971, 974 (Tenn. 1951); *Meacham v. Louisville & N.R.R.*, 169 S.W.2d 830, 832 (Ky. 1943).

¹¹ The regulatory authorities here may be either state or federal, depending on various factors. See generally *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 317-19; *Schnabel v. County of DuPage*, 428 N.E.2d at 677. See also note 13 *infra*.

This principle should be even stronger where, as in the instant case, the railroad easement has been obtained by condemnation rather than voluntarily by conveyance. In that situation, the easement itself is created by public regulation, and thus it is all the more clear that the terms of the easement from the outset will be controlled in part by actions of the regulatory authorities. See *Sparrow v. Dixie Leaf Tobacco Co.*, 61 S.E.2d 700, 703 (N.C. 1950).¹²

Although this principle has not been articulated frequently in the context of railroad easements, it is well-established generally that contracts with railroads are deemed to have been entered into with the understanding that they may need to yield to regulation in the public interest. This Court made the point clearly many years ago in *Louisville & Nashville Railroad v. Mottley*, 219 U.S. 467 (1911). There, the Court held that the plaintiffs' agreement with the defendant railroad could not be enforced because subsequent regulatory action by the government prohibited enforcement. The Court explained its holding by quoting with approval, *inter alia*, *Fitzgerald v. Grand Trunk Railroad*, 22 A. 76, 77 (Vt. 1891), a case involving a party's contract with a railroad for the transportation of lumber. In the quoted passage, the Supreme Court of Vermont, applying Vermont law, had stated as follows:

Such commerce is solely regulated by Congress, and when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right

¹² See also *Chicago, M., St. P. & P. R.R. v. Chicago G.W. Ry.*, 130 N.W.2d 56, 59 (Minn. 1964) ("Railroads by virtue of their franchises, as well as their statutory grants of powers of eminent domain, are quasi-public corporations which have been accorded rights and privileges . . . in consideration of their rendition of transportation services in the best interests of the public . . . '[W]hatever is necessary to the exercise of the franchise is for the benefit of the public.'") (citation omitted) (quoting *Chicago G.W. Ry. v. Jesse*, 82 N.W.2d 227, 231 (Minn. 1959)).

in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority.

219 U.S. at 484 (emphasis added).¹³

As a result, under state property law, any legitimate regulatory action which affects the duration of a railroad easement should not be treated as modifying the terms of the easement. Rather, that action, although not necessarily predictable, is considered to be generally anticipated by the parties, and therefore it is consistent with the terms of the easement. This is particularly true in *amicus* Montgomery County's situation, where the regulatory action under Section 8(d) ensures that the right-of-way will be used for rail purposes in the near future. This type of situation clearly is encompassed within the sphere of legitimately expected regulation. See also *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (49 U.S.C. § 10905 was specifically intended to allow the ICC to order transfer of an otherwise defunct freight line to an entity that would use the line for passenger rail service).

In any event, it seems clear under the circumstances presented by the instant case that Vermont law—and perhaps state law generally—would not consider the easement to be extinguished, nor would it consider petitioners' reversionary interest to have matured. Vermont law simply would treat the ICC's action under Section 8(d) as an understood term of the easement. See *Fitzgerald v. Grand Trunk R.R.*, 22 A. at 77.

¹³ Even prior to the advent of significant abandonment regulation by the ICC in 1920, railroad service was subject at least to state regulation. See generally *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 315-316 n.5; *Gibbons v. United States*, 660 F.2d 1227, 1233 (7th Cir. 1981). As a result, the principle discussed in the text above does not discriminate between state and federal regulation and should be applicable to all railroad easements, including petitioners' alleged easement, regardless of when created or entered into. See *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911).

Thus, when properly viewed from the perspective of state property law, rather than simply treated as a case of federal preemption as the District of Columbia Circuit does in *National Wildlife Federation*, there no longer is any basis for suggesting that the ICC's action under Section 8(d) effected a taking of petitioners' property interest. Under state property law, nothing has changed. No property interest has been denied to petitioners, even temporarily. Petitioners' reversionary interest has not been taken away from them. They still hold it, on the same terms as before. Meanwhile, because their reversionary interest has not yet matured, there is no right of petitioners to unencumbered possession of the land which could be taken away.

B. The District Of Columbia Circuit In *National Wildlife Federation* Incorrectly Analyzes Section 8(d) Under The Takings Clause.

The District of Columbia Circuit's analysis falters in the *National Wildlife Federation* case because it wrongly views ICC action under Section 8(d) as preempting, or modifying, state property law rather than as being consistent with it. Thus, the court states that ICC action under Section 8(d) "displace[s]" state property law. 850 F.2d at 705. It then characterizes the "sole issue here" as whether "reversionary owners whose property interests are defeated by the preemptive effect of the Trails Act Rules upon state laws" are entitled to compensation for a taking. *Id.* Operating from this erroneous perspective, the court later suggests that a taking might occur in some circumstances under Section 8(d).

The District of Columbia Circuit's confusion on the taking issue is reflected in its heavy reliance on analysis by the Supreme Court of Washington in a case construing a state statute that provided for trail use on fully abandoned rights-of-way as to which the ICC's regulatory process had been concluded. See *id.* at 704-05, 705 n.16. That case, *Lawson v. State of Washington*, 730 P.2d 1308, 1315-16 (Wash. 1986), is also relied on by petitioners here.¹⁴

¹⁴ Petitioners also cite to several other state cases which are similar to

In *Lawson*, the ICC had issued a certificate authorizing Burlington Northern Railroad Company ("Burlington Northern") to abandon a right-of-way. At the same time, however, the ICC imposed a post-abandonment "public use" condition pursuant to 49 U.S.C. § 10906. Under this condition, Burlington Northern was precluded from disposing of its interest in the right-of-way for 120 days after the effective date of the abandonment certificate, unless that interest were first offered for sale on reasonable terms to an entity that would use it for public purposes. During the 120-day period, King County purchased the right-of-way for use as a hiking and bicycle trail. This transaction later was challenged by property owners who claimed that Burlington Northern had held easements for "railroad purposes only" and not, as Burlington Northern had believed, "perpetual public easement[s]" allowing "a change from one transportation use to another transportation or recreation use, or any other consistent public use." 730 P.2d at 1311, 1312. The court agreed with the property owners and held that the easements were for "railroad purposes only." *Id.* at 1313. As a result, the court explained, the easements could not be transferred from Burlington Northern to King County because Burlington Northern had abandoned the line under state property law through its attempt to convey its interests to King County, and therefore the easements had been extinguished. *Id.* at 1312-13.

The *Lawson* court then went on to analyze King County's alternative argument that a Washington trail-use statute authorized the transfer of the easement from Burlington Northern to King County. That statute purported to modify existing Washington common law by providing, *inter alia*, that if a public agency, such as King County, acquired a limited railroad easement and used it for other public purposes, the underlying reversionary interest would not mature upon the cessation of railroad operations. The court concluded that the statute effected an unlawful taking because

Lawson, but those cases are equally inapposite. See *McKinley v. Waterloo R.R.*, 368 N.W.2d 131 (Iowa 1985); *Pollnow v. Wisconsin Department of Natural Resources*, 276 N.W.2d 738 (Wis. 1979); *Schnabel v. County of DuPage*, 428 N.E.2d 671 (Ill. App. 1981).

it was "clearly a departure from common law" and did "not merely embody common law." *Id.* at 1313. As the court explained, because the property owners' reversionary interest had matured under the common law, the county's invocation of the statute plainly changed the property owners' possessory rights in the land.¹⁵ *Id.* at 1312-13.

Thus, while *Lawson* itself may have been correctly decided, it nevertheless is fundamentally different from this or any other case involving Section 8(d). The state statute invoked by the county in *Lawson* modified the property owners' vested common law rights, and in doing so it clearly effected a taking. Section 8(d), on the other hand, operates prior to completion of an abandonment proceeding, and thus in no way does it modify a property owner's common law rights. Section 8(d) is the type of railroad regulation in the public interest that state property law anticipates may arise, as it is designed to preserve rail corridors, and thus it should be considered essentially as one of the terms of the easement. State property law should continue to interpret the easement as one for railroad use only, and it similarly should continue to provide that the property owner's reversionary interest has not yet matured.¹⁶

¹⁵ The District of Columbia Circuit suggests that reversion was merely "imminent" when King County obtained the right-of-way for trail use in *Lawson*. *National Wildlife Federation*, 850 F.2d at 704. However, according to Washington property law, reversion actually occurred. Burlington Northern, which had received ICC abandonment authorization, abandoned the line when it attempted to convey its interests to King County, and at that point the easements were extinguished and reversion occurred. *Lawson v. State of Washington*, 730 P.2d at 1312-13. Petitioners point out in their brief on the merits that Vermont property law is the same as Washington property law on the issue of reversion. (Pet. Br. at 17.)

¹⁶ The District of Columbia Circuit at one point describes ICC action under Section 8(d) as effecting the "postponement" of the property owner's reversionary interest. 850 F.2d at 704. But, mere postponement cannot effect a taking because the reversionary interest has not yet matured. See also *Lehigh & N.E. Ry. v. Interstate Commerce Commission*, 540 F.2d 71, 82 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (characterizing ICC action denying abandonment and directing railroad to continue service as

In sum, therefore, it is clear that the Second Circuit's analysis below, although at times conclusory, is nevertheless fully supportable. Section 8(d) does not effect a taking, and no taking occurred in this case. The concerns raised by the District of Columbia Circuit in *National Wildlife Federation*, meanwhile, are inapposite because they arise from that court's fundamental misunderstanding of the taking issue.

C. ICC Action Under Section 8(d) Is Not Materially Different From Other Types Of ICC Action Regulating Railroad Abandonments.

The conclusion that ICC action under Section 8(d) does not constitute a taking is buttressed by a review of other types of ICC action regulating railroad abandonments. ICC action under Section 8(d) is not materially different from other ICC actions pertaining to abandonments, none of which ever has been held to constitute a taking.

For example, the ICC has the authority to deny a proposed abandonment and order the railroad to continue operating the line, even where the railroad is losing money on the line and wishes to discontinue service and abandon the line. 49 U.S.C. § 10903(b)(1)(B). *E.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 461, 491-92 (1970); *Lehigh & N.E. Ry. v. Interstate Commerce Commission*, 540 F.2d 71, 82, 84 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *Northwestern Pac. R.R. v. United States*, 228 F. Supp. 690, 693-94 (N.D. Cal. 1964). The ICC also can deny a proposed abandonment and order the line sold to another entity for continued railroad use, even without the consent of the railroad proposing aban-

not a taking, but rather "merely a postponement of the carrier's right to abandon" (footnote omitted). State property law contemplates the possibility of this type of postponement, at least where, as here, it is due to regulatory authorities acting in the public interest. Postponement could only serve as a taking *after* the reversionary interest has matured. If the property owner is then told that he cannot enjoy the use of his land, he would be able to argue that an interest in property has been taken from him. *See, e.g.*, *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986); *McKinley v. Waterloo R.R.*, 368 N.W.2d 131 (Iowa 1985); *Pollnow v. Wisconsin Department of Natural Resources*, 276 N.W.2d 738 (Wis. 1979); *Schnabel v. County of DuPage*, 428 N.E.2d 671 (Ill. App. 1981).

donment. 49 U.S.C. § 10905. *See Hayfield N.R.R. v. Chicago & North Western Transp. Co.*, 467 U.S. at 629. Or, again without the consent of the railroad proposing abandonment, the ICC can order that railroad to accept private subsidies and continue its operations. *Id.*

In each of these situations, the subject line would have been abandoned, and any easement presumably would have been extinguished, *but for* the ICC's action in ordering the line to remain open. However, as in the case of Section 8(d), no taking occurs because state property law interprets railroad easements as contemplating the ICC's exercise of its authority over railroad abandonments.

It is instructive to note that this Court and the lower courts have held that these similar types of ICC action do not even effect a taking of the railroad's own property interest in the line at issue, even though in each instance the railroad was precluded from using or disposing of its interest, or its interest was significantly devalued. For example, in *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the railroad was forced to continue operations on unprofitable lines for years, and the value of the lines significantly declined. This Court explained that the railroad's owners, "by their entry into a railroad enterprise, . . . assumed the risk that . . . the interests of the public would be considered as well as theirs." *Id.* at 492 (quoting *Reconstruction Finance Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 535-36 (1946)). Similarly, in *Lehigh & New England Railway v. Interstate Commerce Commission*, 540 F.2d 71 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977), where the railroad's property interest in the line essentially was turned over to another railroad which then operated the line, the court explained: "It might be anomalous indeed if the ICC could order forced deficit operations by a railroad and not effect a taking, but could not order another carrier to discharge those same duties, thereby in the usual case saving that railroad operating costs, without such action constituting a taking." *Id.* at 84.

When the reasoning in these cases is applied to the instant case, it would seem that *a fortiori* no taking has occurred

here. In the above cases, ICC regulation affected present, matured property interests of the railroads, yet no taking occurred because, as part of a "railroad enterprise," they were deemed to have "assumed the risk" that their interests would be placed behind those of the public. In the instant case, petitioners' affected interest has not even matured, but more importantly it is part of a "railroad enterprise," and thus petitioners (or their predecessors in interest) are deemed to have understood, when the easement was created, that their reversionary interest would be subject to the interests of the public.

Similarly, ICC action under Section 8(d) might be better understood if it were viewed as merely a form of subsidy or economic assistance to a financially troubled railroad. To preserve a line that otherwise would have to be abandoned, another entity is paying for the interim maintenance of the discontinued line. Moreover, instead of receiving in return better service or a share in the profits from any future operations of the line, the aiding entity receives a current incentive in the form of the right to use the right-of-way in a manner not incompatible with the preservation of the line for future railroad use.¹⁷

Under this view, the instant case really is no different from that presented when the ICC allows a railroad to discontinue all service on a line, but does not require the railroad to abandon the line. 49 U.S.C. § 10903(a)(2). *See, e.g., Baltimore & Annapolis Railroad Co.—Abandonment*, 348 I.C.C. 678 (1976). This type of discontinuance has precisely the same impact on the underlying property owner as does Section 8(d). As the ICC has explained:

A railroad's decision to enter into a Trails Act agreement is similar to a carrier's decision to seek discontinuance rather than full abandonment authority for a particular line. Discontinuance authority, like rail banking, allows a railroad to cease operating a line for an

¹⁷ In the case of *amicus* Montgomery County, its interim uses of CSX's former freight line are clearly compatible with the preservation of that line for future railroad use. (See Part III.B. *infra*.)

indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future.

Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No. 13) ("Trails III"), 54 Fed. Reg. 8011, 8012-13 (1989).

As with Section 8(d), moreover, no taking occurs in the context of a discontinuance. It is within the ICC's authority over railroad abandonments to allow discontinuance without abandonment, and therefore state property law again would provide that any railroad easement, under its own terms, would not be extinguished. "[P]etitioners' reversionary interest, if any, is not postponed any more by the operation of [Section 8(d)] than it could otherwise be affected by the ICC's continuing jurisdiction," such as in the discontinuance situation. *Preseault*, 853 F.2d at 151.

D. ICC Action Under Section 8(d) Properly Falls Within The ICC's Authority Over Railroad Abandonments.

The only way in which Section 8(d) conceivably could effect a taking would be if it required the ICC to take action which was beyond its authority over railroad abandonments. In that event, the regulatory action would not be of the type generally anticipated by the parties to the easement, and their common law property rights therefore would be modified by it.

Petitioners have not sought to make this argument, and in any event it would fail. Congress designed Section 8(d) as a means to preserve rail corridors for the potential reactivation of rail service¹⁸ (see Part III *infra*), and that is a matter which plainly fits within the ICC's authority over railroad abandonments. As the Second Circuit explained below:

Preserving railway corridors for future railway use is a function that congress has recently delegated to the

¹⁸ "Congress's authority to regulate the railroads is well recognized, . . . as is its authority to regulate railroad abandonments." *Preseault*, 853 F.2d at 150 (citations omitted).

ICC, and it is, as discussed earlier, permissible under the commerce clause. For as long as it determines that the land will serve a "railroad purpose", the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle congress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.

Preseault, 853 F.2d at 151.

Moreover, petitioners cannot argue that, in this particular case, the ICC acted beyond its authority over railroad abandonments because it did not specifically find that future rail use was definite. Congress's delegation to the ICC is not so limited. The ICC's authority here extends more broadly to actions which preserve railway corridors, and not merely to actions which concern specific or likely railway use in the future. As the ICC has explained:

Congress did not distinguish between short- and long-term rail banking, and, therefore, we do not believe that specific contingency plans for reactivation of a line are necessary to justify retention of a potentially valuable national asset. In any event, the fact that the railroad agrees to trail use is indication in and of itself that the corridor may be valuable in the future for transportation.¹⁹

Trails III, 54 Fed. Reg. at 8013.

Thus, as the Second Circuit cogently noted below, there is no legitimate reason "to stifle congress's creative effort" in devising the financial assistance mechanism embodied in Section 8(d). *Preseault*, 853 F.2d at 151. The power granted

¹⁹ Further, the District of Columbia Circuit in *National Wildlife Federation* acknowledged that "there is at least some experience showing that a railroad that enters into an agreement for interim trail use may in fact intend to resume service in the foreseeable future." 850 F.2d at 707.

to the ICC in Section 8(d) falls within its plenary and exclusive authority to regulate railroad abandonments, and the ICC's exercise of that power here does not effect a taking under the Fifth Amendment.

E. If The Court Adopts A Case-By-Case Approach To The Takings Issue, Montgomery County's Experience Illustrates That Many Potential Applications Of Section 8(d) Would Not Effect A Taking.

If this Court nevertheless were to agree with the position of the District of Columbia Circuit in *National Wildlife Federation* and hold that Section 8(d) could effect a taking, it should make clear that this determination calls for a "case specific process." *National Wildlife Federation*, 850 F.2d at 706. The Court also should recognize that, in many of its potential applications, Section 8(d) plainly would not effect a taking.

Most obviously, as the District of Columbia Circuit acknowledges, a "temporary imposition" upon the property owner's reversionary interest would not constitute a taking where "necessary in order to ensure the continuation of existing rail service." *Id.* at 708. Although the District of Columbia Circuit does not explain what might constitute a "temporary imposition," it does cite to cases which it finds analogous to the situation presented by Section 8(d). In one of those cases, *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the ICC refused to allow the railroad's proposed abandonment of an unprofitable line, and this "temporary imposition" lasted seven years without effecting a taking. See *id.* at 491-92. Accordingly, under this standard, it would seem that a taking would not occur under Section 8(d) if future rail use was reasonably projected to resume.

One example of a case that would satisfy this standard and not represent a taking is found in *Chicago and North Western Transportation Co.- Abandonment Exemption - Guthrie and Dallas Counties, IA*, ICC No. AB-1 (Sub. No. 192X) (served May 20, 1987). There, according to the District of Columbia Circuit in *National Wildlife Federation*, "the Commission authorized interim trail use on a right-of-way

that was adjacent to the site of a proposed coal-fired power station, reasonably projecting that if the power station were built, rail service would be reactivated in order to haul coal." 850 F.2d at 707.

Even more compelling is *amicus* Montgomery County's situation. The county is actively pursuing plans for a light rail transit system which would preserve rail use on the right-of-way, create extensive recreational opportunities along a trail system paralleling the light rail line, and be consistent with future reactivation of freight rail service over the same right-of-way. (See Interest of Amicus *supra*.) Clearly, no taking is occurring there either.

II. Section 8(d) Cannot Effect An Unconstitutional Taking Of Private Property Because The Tucker Act Provides A Mechanism For Obtaining Just Compensation.

Even assuming *arguendo* that Section 8(d) could effect a taking of private property, it is clear that under no circumstances would such a taking be unconstitutional. As respondents correctly will argue in detail in their brief on the merits, the Tucker Act provides a mechanism for property owners like petitioners to obtain just compensation in the Court of Claims.

But, this Court need not, and should not, decide this case solely on that basis. It would be inefficient and a waste of judicial and other resources to direct petitioners to the Claims Court. Before the Claims Court could even consider an appropriate amount of compensation,²⁰ it would have to decide the taking issue. Whatever decision it makes on the taking issue surely would be appealed, and it inevitably would work its way back to this Court on petition for a writ of certiorari.

²⁰ Because full compensation for a railroad easement condemnation frequently will have been paid, just as if a fee interest had been acquired (see p. 8 *supra*), a Claims Court determination that a taking has occurred upon a subsequent acquisition under the Trails Act would not necessarily lead to a finding that the taking is compensable.

No purpose would be served by such a diversion,²¹ especially since the Second Circuit below already has ruled that Section 8(d) under no circumstances effects a taking and that issue is now squarely before this Court.

III. The Trails Act Lies Well Within The Outer Limits Of "Plenary" Congressional Power Under The Commerce Clause.

As an apparent afterthought to their Fifth Amendment argument, petitioners suggest that the Commerce Clause does not encompass legislation such as Section 8(d). This notion has been rejected by every court which has considered the question. (See Part III.A. *infra*.) But, even if it were true that the rail corridor preservation aspect of Section 8(d) is a "sham," as Petitioners contend (Pet. Br. at 40), it still would not follow that the enactment is *ultra vires* under the Commerce Clause. Much more than railroad regulation is embraced by the Commerce Clause.

In actuality, Montgomery County's use of Section 8(d) illustrates that the avowed congressional goal of "protect[ing] rail transportation corridors" for "future reactivation" is much more than merely pretextual. The rail transit line the county seeks to build along the portion of the Georgetown Branch it has acquired under Section 8(d) is itself a railroad use of that interstate branch, and will be entirely consistent with future restoration of rail freight service.

Legislation fostering such activities surely goes to the heart of the nation-building purposes served by the Commerce Clause. Section 8(d) merely supplements the rail abandonment provisions of 49 U.S.C. §§ 10903 *et seq.*, which long have served the important Commerce Clause goal of promoting national uniformity in regulation of a matter having national importance, *i.e.*, exit from interstate rail transportation markets. While 49 U.S.C. §§ 10903 *et seq.*, with or without the addition of Section 8(d), may affect state prop-

²¹ The continued uncertainty over the future viability of Section 8(d) also would impact adversely on non-parties such as *amicus* Montgomery County, as is discussed above in the "Interest of Amicus" section of this brief.

erty law rights that would prevail in their absence, it does not follow that such enactments should be singled out for strict scrutiny in derogation of normal Commerce Clause analysis. Such an exception would swallow up the *Hodel* rule of deferential review (see Part III.A. *infra*) because at least some pre-existing local interests inevitably are affected whenever uniform national regulation is imposed on activity previously subject to disparate state rules.

A. Legislative Invocations Of The Commerce Clause Are Subject To Only The Most Limited Review.

In cases too numerous to cite exhaustively, this Court has emphasized that Congress is entitled to a notable degree of deference when it purports to legislate under the Commerce Clause. The principle is well expressed in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, ante [452 U.S. 264 (1981)], at 276; *Katzenbach v. McClung*, 379 U.S. 294, 303-304 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 262 (1964).

If a regulated activity (such as railroading) affects interstate commerce, it is axiomatic that federal regulation properly may extend to the "instrumentalities" of that commerce located in a single state (such as a right-of-way), or even to purely intrastate activities affecting interstate commerce. See, e.g., *Perez v. United States*, 402 U.S. 146, 150 (1971); *Fry v. United States*, 421 U.S. 542, 547 (1975), *cert. denied*, 421 U.S. 1014 (1978). The fact that a particular instance of a regulated activity has only a slight effect on interstate commerce does not invalidate the regulations, especially if the cumulative impact of the activity is substantial. *Hodel v. Indiana*, 452 U.S. at 324-326; *Texas v. United States*, 730 F.2d 339 (5th Cir.), *cert. denied*, 469 U.S. 892 (1984). More-

over, the required nexus between means and ends does not necessitate or permit judicial assessment of whether the legislation serves its avowed purpose effectively. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 283.

Every court which has examined the constitutionality of Section 8(d) under these well-established criteria has found it to be a valid exercise of congressional power under the Commerce Clause. See, e.g., *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 1989 WL 72498, at 6-7 (8th Cir. July 5, 1989); *Preseault*, 853 F.2d at 149-150; *National Wildlife Federation*, 850 F.2d at 705. The reasons for this unanimity will become apparent in ensuing discussion.

B. Both The "Rail Corridor Preservation" Aspect And The "Recreational Trails" Aspect Of Section 8(d), Including Preservation For Passenger Rail Transit Uses, Are Within The Scope Of The Commerce Clause.

As support for their claim that the Trails Act is *dehors* the Commerce Clause, petitioners baldly assert that "the actual purpose of [Section 8(d)] is the creation of hiking and biking trails, not the preservation of needed rail rights-of-way."² (Pet. Br. at 41.) Assuming without conceding that this assertion is tenable, it advances petitioners' Commerce Clause argument not at all.

Artfully concealed in petitioners' argument is the preposterous assumption that railroads (and, perhaps, other mechanized modes of commercial transportation) are the only fit subject of transportation regulation under the Commerce Clause. Such a notion is entirely inconsistent with the Commerce Clause jurisprudence of this Court. It is well-established that "commerce" subject to federal regulation includes

² The Court need not be detained by petitioners' argument (Pet. Br. at 42) that the placement of the Trails Act in Title 16 detracts from its rail corridor preservation purposes. It is well established that the mere placement of a statute in the Code provides no reliable guide to its proper construction. See, e.g., *Warner v. Goltra*, 293 U.S. 155 (1934); *United States v. The Pietro Campanella*, 44 F. Supp. 348 (D. Md. 1942).

transportation of passengers as well as freight;²³ may embrace pleasure trips as well as travel that is "commercial in character";²⁴ need not involve a for-hire vehicle;²⁵ and, indeed, need not be accomplished by mechanical means at all.²⁶ To the framers of the Commerce Clause, who lived in an era when most interstate journeys were accomplished on foot or hoof, an argument that footpaths had nothing to do with "commerce" undoubtedly would have seemed peculiar indeed.

In truth and in fact, of course, Montgomery County's experience under the Trails Act demonstrates that the rail corridor preservation objectives of Section 8(d) are not pretextual; they are genuine, and indeed would be easily sustained under an efficacy-based standard of review if such review were a proper judicial function. After all, the Trails Act has permitted the county to purchase an unused rail corridor ideally suited for passenger rail transit between two of its most congested areas. (*See Interest of Amicus supra.*) Because the rail preservation objectives of the legislation are genuine, it is immaterial whether or not other congressional motivations for passing the Trails Act (such as expansion of recreational trails) are within or without the scope of the Commerce Clause. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. at 257 (moral and ethical motivations did not detract from validity under Commerce Clause of public-accommodation provisions of civil rights legislation).

It is equally immaterial that Montgomery County's initial plans are to utilize its segment of the Georgetown Branch for light rail passenger transit service, as distinguished from ICC-regulated freight service such as formerly was provided by CSX. Although the ICC, which administers Section 8(d), no longer regulates most urban passenger transit services,²⁷

²³ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964).

²⁴ *Id.* at 256-257.

²⁵ *Whitaker v. United States*, 5 F.2d 546 (9th Cir.), cert. denied, 269 U.S. 569 (1925).

²⁶ *Thornton v. United States*, 271 U.S. 414 (1926) (interstate cattle drives); *Railroad Co. v. Husen*, 95 U.S. 465 (1877) (same).

²⁷ *See* 49 U.S.C. § 10504.

nothing in that section requires that future rail uses, for which rights-of-way are to be preserved, must involve the type of rail freight transportation regulated by the ICC. Section 8(d) speaks in terms of preservation simply for "railroad purposes," not for use solely by rail carriers "providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105" of Title 49 of the United States Code.²⁸ *Compare* 16 U.S.C.

²⁸ It is even more obvious that Section 8(d) does not breach the outer limits of the Commerce Clause merely because its coverage extends beyond the sphere of ICC rail carrier regulation. That the Commerce Clause permits federal regulation of urban transit systems and other rail passenger services—at least where, as here, they affect or operate in interstate commerce—is apparent from the history and structure of ICC regulation itself. Prior to enactment of 49 U.S.C. § 10504, the ICC actively regulated rail passenger fares, including transit and commuter fares in multistate urban areas. *See, e.g., Increased Commutation Fares, C.R.R. of N.J.*, 308 I.C.C. 119 (1959); *Passenger Fares of Hudson & M.R.R.*, 227 I.C.C. 741 (1938). Moreover, the ICC comprehensively regulated exit from rail passenger service under the predecessor of 49 U.S.C. § 10908 until passage of the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327, and still may do so in instances where rail carriers cannot or do not avail themselves of the procedures of that Act. *See generally National Railroad Passenger Corp. v. Atchison, T. & S.F.R.R.*, 470 U.S. 451, 454-56 (1985). Of course, contemporary federal engagement in urban mass transit support, planning and funding is pervasive, through the Urban Mass Transit Administration within the Department of Transportation. *See generally* 49 U.S.C. §§ 1601 *et seq.* Against this background of longstanding federal involvement, there can be little doubt that urban passenger rail services which affect or operate in interstate markets constitute an activity to which legislation under the Commerce Clause permissibly may extend. *Cf. Southern Pac. Transp. Co. v. Cummins*, No. A8705-02900, slip op. (Or. Cir. Ct., Multnomah Cty., Dec. 10, 1987) (acquisition of abandoned freight line for future transit use held not to disturb rail use easements).

Although Montgomery County's proposed light rail transit line will be physically situated entirely within Maryland, its relationship to interstate commerce is clear and direct. The transit line would utilize and help preserve a portion of the Georgetown Branch, which was an interstate branch line between Maryland and the District of Columbia; it would connect directly with two stations of the Metro subway system which serves the District and two States; and it is projected to draw 23 percent of its ridership from District of Columbia residents. (*See Interest of Amicus supra.*) It is apparent that many passengers using such a transit line would

§ 1247(d) *with*, e.g., 49 U.S.C. §§ 10701a(a), 10705a(a)(1)(A), 10706(a)(2)(A) *et seq.*²⁹

Thus, to hold that the broadly drafted rail preservation purposes of Section 8(d) are consistent with the Commerce Clause does not require resort to aggressively expansionist interpretations of that clause, such as have drawn increasing criticism from members of this Court in recent years.³⁰ Simply stated, the rail corridor preservation purposes of the Trails Act are well within the outer boundaries of traditional Commerce Clause jurisprudence.³¹ It is precisely for these

do so with a fixed and persisting intent to continue their journeys, without interruption, beyond the confines of Maryland, such that the "essential character" of their travel on the county's transit line would be interstate. See, e.g., *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111, 122 (1913); *Baltimore & O.S.W.R.R. v. Settle*, 260 U.S. 166, 170-171 (1922).

²⁹ Even if it were necessary to establish a direct impact on future rail freight service opportunities, use of Section 8(d) to foster interim passenger transit uses clearly would pass Commerce Clause muster. In purely practical terms, it is difficult to conceive of a more effective means of preserving a freight railroad corridor, by preventing encroachments on or obstructions of the right-of-way, than to use it for light rail transit operations in the meantime. Beyond that, however, courts long have recognized that interim passenger services could play an important role in preserving rail freight corridors, and that such preservation was itself an objective well within the traditional realm of Commerce Clause regulation. See, e.g., *Reed v. Meserve*, 487 F.2d 646 (1st Cir. 1973).

³⁰ See, e.g., concurring opinion of then Justice Rehnquist in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. at 307-13.

³¹ The Court need not be long detained by petitioners' attempted sophistry as to the supposed interplay between the abandonment provisions of 49 U.S.C. § 10903 on the one hand and, on the other hand, the relevant provisions of the Trails Act:

In other words, "railbanking" [under the latter Act] is permitted only *after* the ICC concludes that "railbanking" is not needed. If "railbanking" *were* needed, then the ICC *could not* find that the right-of-way is *not* needed for *future* public convenience and necessity. And yet, an ICC finding of *no* future need must be made before trail use is ever considered. (Pet. Br. at 41 (emphasis in original).)

There is a short answer to this artificial conundrum. It is that the ICC's convenience and necessity findings necessarily are made on the record before the agency, see 5 U.S.C. § 554(d). Thus, their predictive value for

reasons that any impacts of Section 8(d) on reversionary interests underlying a "railbanked" right-of-way should come as no surprise to the holders of such interests. As discussed in Part I *supra*, the additional exit regulations imposed by Section 8(d) are not substantially different in kind or type from those to which railroads long have been properly subject under the Commerce Clause, as well as under state laws in the era pre-dating federal abandonment regulation.

C. Strict Scrutiny Of Any Commerce Clause Enactment That Might Affect State Property Law Interests, As Demanded By Petitioners, Would Vitate The Long-Recognized Utility Of The Clause In Harmonizing Disparate State-Law Approaches To Issues Of National Concern.

Perhaps recognizing that their effort to banish railroad corridor preservation legislation beyond the Commerce Clause pale borders on the bizarre, petitioners attempt to endow it with respectability by borrowing a phrase from this Court's recent *Nollan* decision. The verbal transplant will not take, however, because *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), has nothing to do with the Commerce Clause. While *Nollan* does warn that the Court will undertake "particularly careful" scrutiny where *state* exercise of police powers appears to work an uncompensated "abridgment of property rights," *id.* at 3150, petitioners overlook the fact that the Commerce Clause itself imposes limits on the exercise of state police powers. The scope of review appropriate when state regulations are assailed under either the Taking Clause or the Commerce Clause simply affords no analogy to the scope of review appropriate when Congress seeks to *exercise* the Commerce Clause.

the future necessarily is limited by the evidence available to the parties, i.e., the facts and circumstances known to them at the time of a proposed abandonment. The whole idea of "railbanking" under the Trails Act is that such facts and circumstances might change, and change radically, over the span of subsequent years and subsequent generations. The Commerce Clause is not offended by transportation policymakers' exercise of foresight. *Reed v. Meserve*, 487 F.2d at 649-65.

More particularly, petitioners' *Nollan* analogy breaks down because Congress properly, and with great frequency, exercises its Commerce Clause powers for the precise purpose of overriding rights otherwise established by state law, where interstate commerce is impeded by inconsistent state regulations. This Court long has recognized that promotion of uniform nationwide regulation of matters nationwide in scope is one of the fundamental purposes of the Commerce Clause. In matters of interstate commerce, "the United States are but one country and are and must be subject to one system of regulations." *Robbins v. Taxing District of Shelby County*, 120 U.S. 489, 494 (1887). See also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 280; *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-69 (1945); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-331 (1944) (purpose of Commerce Clause is to "create an area of free trade among the several states"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

It is inconceivable, and it is not the law, that the uniformity objectives of the Commerce Clause could be impeded by an intrusive standard of judicial review whenever state law rights are adjusted by federal laws or regulations for the very purpose of promoting uniform regulation. For example, the deference due congressional enactments under the Commerce Clause is not narrowed when the enactment alters or extinguishes a shipper's right to collect state law damages occasioned by an ICC-approved railroad abandonment. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 324-332. Nor is strict scrutiny, much less compensation for a taking, required when the ICC determines that a rail carrier temporarily providing directed service over another carrier's lines (pursuant to what is now 49 U.S.C. § 11125) need not pay rent to the other carrier except in the unlikely event that the directed service proves profitable. *Lehigh & N.E. Ry. v. Interstate Commerce Commission*, 540 F.2d at 81-85. And, in *Schwabacher v. United States*, 334 U.S. 182 (1948), not even the thoughtful dissent of Justice Frankfurter, *id.* at 202-10, suggested that a compensable taking, or a need for special scrutiny under the Commerce

Clause, might result from the majority's determination that the ICC's plenary jurisdiction over a railroad merger required it to consider whether to disallow state law appraisal rights of dissenting shareholders. See also *Texas v. United States*, 730 F.2d at 346, 348 (deferential *Hodel* analysis applied to Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, despite the fact that it extinguished all state-law rights and remedies relating to intrastate railroad freight rate regulation in states not agreeing to apply Staggers Act standards).

In railroad abandonment situations, the provisions of 49 U.S.C. §§ 10903 *et seq.* long have served to impose badly-needed uniformity and certainty on state laws otherwise applicable to reversionary interests in railroad rights-of-way. (See Part I.A. and I.B. *supra*.) The pre-existing disparities among state laws relating to railroad easements and reversionary interests were recognized by the District of Columbia Circuit in *National Wildlife Federation*, 850 F.2d at 703, and will be documented extensively in a separate brief being filed by certain *amicus curiae* states. This problem is illustrated by Montgomery County's situation. Although the county believes that Maryland law (see note 6 *supra*) supports the continued validity of the easements underlying the portion of the Georgetown Branch it acquired, the county also recognizes that the greater degree of uniformity and certainty afforded by federal abandonment law, as recently enhanced by Section 8(d), significantly advances the goal of preserving rail corridors for future use.

Simply put, the permissible scope of legislation designed to enhance uniform regulation under the Commerce Clause, such as Section 8(d), is not and cannot be narrowed by the mere possibility that the enactment might override otherwise applicable state law rights and remedies. Indeed, even if a taking were to occur as a result of such legislation, the remedy would be through a claim for compensation under the Tucker Act as discussed in Part II *supra*, not through invalidation of the legislation as improper under the Commerce Clause.

For a proper perspective on the Commerce Clause issues presented in this case, it would be difficult to improve on the First Circuit's characterization of the breadth and importance of the ICC's powers to foster preservation of rail corridors for future rail use. In *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973), decided long before passage of the relevant portion of the Trails Act, that court upheld a rail line's resale to an excursion railroad operator under a rationale which is even more compelling here (emphasis added):

The phrase "public convenience and necessity" [in the abandonment provisions of the Transportation Act of 1920] is not, of course, infinitely elastic. The ICC may not ignore the effects of its decisions on interstate commerce or competition for traffic. The phrase "must be given a scope consistent with the broad purposes of [the statute]: to provide the public with an efficient and nationally integrated rail system." *ICC v. Railway Labor Executives Ass'n*, 315 U.S. 373, 376 (1942). But even a tiny scenic railroad might be thought to contribute much more to such objectives than uses that would require the tracks and right of way to be destroyed. To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need for [abandoned] railroads or for the rights of way over which they have been built. *A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.*

CONCLUSION

The Court should affirm the judgment of the Second Circuit and hold that Section 8(d) of the Trails Act does not effect a taking under the Fifth Amendment and is a valid exercise of congressional power.

Respectfully submitted,

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